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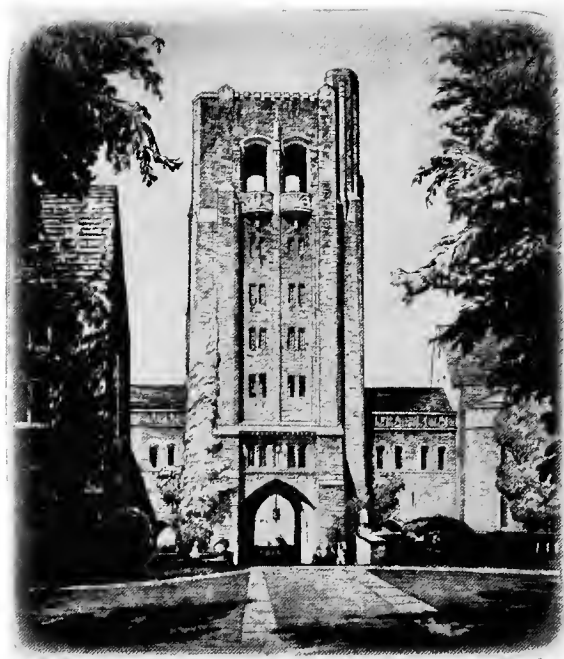

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A TREATISE

ON THE LAW OF

REVIEW IN CRIMINAL CASES

BY THE HIGH COURT AND CIRCUIT COURT OF JUSTICIARY,

AND ON

PROCEDURE IN CRIMINAL CASES IN INFERIOR COURTS IN SCOTLAND,

INCLUDING THE TEXT OF

THE SUMMARY PROCEDURE ACT, 1864, AND THE SUMMARY PROSECUTIONS APPEALS (SCOTLAND) ACT, 1875, WITH FULL NOTES AND CASES, AND AN APPENDIX CONTAINING FORMS, TABLE OF FEES, ETC.

BY

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PREFACE.

THIS treatise is published in the hope that it will prove useful as a book of reference in the preparation and discussion of Advocations, Suspensions, and Appeals in criminal causes.

While its leading title and subject is review, nearly one half of the book (namely, the first part) is devoted to procedure in inferior Courts. The importance of this branch, whether regarded as ancillary to the second part or as a separate subject, became so apparent as the work advanced, that I resolved to treat it at greater length than was at first proposed. I have confined myself, however, to an examination of the leading general procedure statutes and regulations, as it was impossible, within a moderate compass, to deal with the details of the numerous penal statutes now in force.

The text of the leading statutes and regulations will be found arranged under their respective heads in the body of the work; while the Appendix is chiefly devoted to forms of Bills of Advocation and Suspension, and Appeals, and to Interlocutors, and other procedure following upon them. I hope that this arrangement will enable the reader to examine the statutes more conveniently and intelligently than it is possible to do when they are disjoined

from the commentary, and that it will not render them less available for purposes of reference.

It remains to express my best thanks to those who have assisted me in the preparation of the book. I am specially indebted to Mr Charles Scott, Advocate, Clerk of Justiciary, and Mr. A. D. Veitch, Depute-Clerk of Justiciary, for the opportunities which they have afforded me of examining the books and papers in their custody, and for the courtesy and good-nature with which they have answered my frequent inquiries as to matters connected with their department. Mr Scott has also given me some valuable suggestions as to that part of the book which deals with procedure before the High Court of Justiciary; and Mr Veitch has thoroughly revised the forms in the Appendix. I am also much indebted to Mr W. G. Scott-Moncrieff, Advocate, for assistance in the preparation of the Index.

HENRY J. MONCREIFF.

15 Ainslie Place,
1*st March* 1877.

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ERRATA.

P. 39, line 34, for "witnesses'" read "witness's."

P. 97, third line from foot, for "Paley, 55, note (n)," read "Paley, 35, note (h)."

P. 157, second line from foot, and p. 159, note 4, fifth line from foot, for "2 Geo. IV." read "11 Geo. IV."

P. 192, heading, for "1864" read "1875."

P. 218, heading, for "Summary Prosecutions Appeals Act, "1875," read "Appeal under other Statutes."

CHAPTER I.

Of the leading General Statutes and Regulations concerning Procedure in Criminal Causes in inferior Courts in Scotland other than the Summary Procedure Act, 1864.

In suspensions and appeals before the High Court and Circuit Court of Justiciary so many questions arise as to alleged irregularities in procedure in inferior Courts that, in order to follow the arguments and read the decisions in such cases intelligently, it is necessary to have some acquaintance with that procedure. I do not intend at present to give an historical account of the jurisdictions of these courts, or a synopsis of the forms of process observed in them. Neither shall I attempt, except incidentally, to deal with the procedure authorised or prescribed by the numerous special statutes which authorise prosecutions for statutory offences and recovery of penalties. I shall content myself with commenting in some detail upon the leading General Statutes, Acts of Adjournal, and other regulations at present in force on procedure in criminal causes in the inferior Courts in Scotland, and, in particular, upon the Summary Procedure Act, 1864. But as that Act is, with trifling exceptions, permissive, and as its provisions for the most part apply only to prosecutions brought under it, it will be dealt with separately hereafter (Part I., Chap. II.), and this chapter will be confined to the statutes and regulations other than the Summary Procedure Act, 1864.

The inferior Courts in question are:—(1), The Sheriff Courts; (2), The Burgh Courts; (3), The Police Courts; and (4), The Courts of Justices of the Peace.

SECTION I.

Of Procedure in Criminal Causes in the Sheriff Court.

In the Sheriff Court three modes of trial are competent in criminal causes. *First,* With a jury. *Second,* Without a jury on a criminal libel, and *induciæ* of six free days. *Third,* On summary complaint without a jury, and without *induciæ.*[1] Of these modes the first and third only have for many years been used in practice. But all three are competent, and are fully recognised by the institutional writers, and in the statutes, regulations, and decisions to be afterwards mentioned. The second and third are both sometimes termed *summary* trials, as distinguished from trials with a jury, but the designation *summary* properly applies to the third mode of trial alone. Most, if not all, of the Procedure Acts and regulations now in force were passed within the last fifty years; but some account must be given of the earlier practice.

By section 40 of the Heritable Jurisdictions Act, 20 Geo. II., cap. 43 (1747), the Court of Justiciary was empowered to regulate, by Act of Adjournal, the fees to be paid to the clerks or other officers in the Sheriff or Steward Courts in criminal causes, but no power was given to regulate procedure in these Courts. But shortly after the passing of that Act the Sheriffs and Stewards-Depute prepared certain important regulations, which are printed in an appendix to the 2d edition of Louthian's work on *The Form of Process before the Court of Justiciary in Scotland,* published in 1752, four years after the Heritable Jurisdictions Act came into operation.

These regulations, so far as relating to the subject of this chapter, may, with advantage, be here quoted, as they present a very correct and complete picture of the procedure at that date. They possess

[1] At least no *induciæ* need be allowed.

a further interest in this, that the procedure in all criminal courts was then in a state of transition; the Heritable Jurisdiction Act having been recently passed, and many important improvements in the conduct of criminal trials having been introduced in the Court of Justiciary, and imported thence to the inferior Courts. It is also interesting to compare these regulations with those contained in the Act of Adjournal of 17th March 1827, which closely resemble them.[1] The headings here given are not in the original.

REGULATIONS FOR THE SHERIFF AND STEWART COURTS, 1752.

"The regulations appointed to be observed in the Sheriff and Stewart Courts in criminal causes are as follows, viz.:—

Complaint by Signed Petition.

"I. That in all crimes which by their nature require that the party accused should be incarcerated before trial, application shall be made to the Sheriff by Petition, signed by the private party complaining or by the Procurator-Fiscal, setting forth the nature of the crime; and upon considering thereof, the Sheriff shall grant warrant for apprehending and incarcerating the party informed against till such time as he shall be liberated in due course of law."[2]

Trials by Jury.

"II. That crimes which infer loss of life, transportation, banishment furth of Scotland, or demembration, and others of great importance, shall only be tried by jury, unless where the contrary is provided by special statute.

"III. That in crimes to be tried by jury, the forms of the Court of Justiciary shall be followed, excepting only that in all cases the proof, with the objections to the witnesses, and answers, shall be taken down in writing."[3]

Compare Act of Adjournal, 17th March 1827, ch. 5, sec. 1.

Trials on Summons without a Jury.

"IV. That in the trial of crimes without jury, where the form is not directed by special statute, the party accused shall be cited upon a proper summons, signed by the clerk and fully libelled; which summons shall charge the defender to compear personally,

Act of Adjournal, ch. 1, sec. 3, and ch. 5, sec. 2.

[1] References to the corresponding sections of the Act of Adjournal are given on the margin.

[2] Hume, ii. 84, 85, and Statute 1701, c. 6.

[3] It would appear from Hume, ii. 67, quoted *infra*, that although in trials by jury, *induciæ* of fifteen days were often allowed, that number of days was not peremptorily required in inferior Courts.

REGULATIONS, &c.

and to find caution acted in the Sheriff Books, that he shall make answer to the libel, and appear at all the diets of Court.

Ibid., ch. 2, secs. 1, 2, 3, 4. Compare Act of Adjournal, ch. 2, sec. 5.

"V. That the officer who executes the summons shall deliver to the defender, if he finds him personally,—or, if he does not find him, shall leave at his dwelling-house,—a full copy of the summons, together with a list of the names and designations of the witnesses to be adduced against him.[1] That the officer's execution shall certify the delivery of such copy and list, and that six free days shall intervene betwixt the day of the citation and the day of compearance, exclusive of both these days.

Ibid., ch. 1, sec. 3.

"VI. That every criminal summons shall contain a warrant for citing witnesses, conform to a list to be signed by the prosecutor, and given in to the clerk; and such witnesses shall be cited to appear on the same day to which the defender is cited.

Ibid., ch. 1, sec. 1.

Ibid., ch. 4, sec. 1.

"VII. That the defender against whom any criminal summons is executed may take out Letters of Exculpation for proving his defence, if such proof be necessary; which letters the clerk shall be obliged to give out on application of the defender, who shall therein cause cite his witnesses to appear on the same day to which he is himself cited."

Cases requiring Extraordinary Dispatch.

"VIII. That in all cases which require extraordinary dispatch, the private party aggrieved, or the Procurator-Fiscal, may apply to the Sheriff by summary complaint, who will (if he see cause) ordain the complaint to be intimated to the defender, and him to appear personally in Court, and to make answer to the same, upon such *induciæ* as the Sheriff shall think proper."[2]

Procedure at the Diet of Compearance.

Ibid., ch. 3, sec. 1.

"IX. That if at the day appointed the defender appear, and the pursuer be absent, the diet shall be declared to be deserted; and the Sheriff shall, if the circumstances of the case require it, award full costs, so as to indemnify the defender, which costs may be thereafter recovered by all manner of legal diligence.[3]

Ibid., ch. 3, sec. 2.

"X. That if at the day appointed the defender do not compear and find caution as above, the Sheriff shall grant warrant to apprehend and detain him till he find caution.[4]

Ibid., ch. 3, sec. 3.

"XI. That after caution is found, if the defender fail to compear, his bail-bond shall be declared forfeited, and in both cases, whether

[1] By Act of Adjournal, 26th July 1675, it was ordained "That in all "tyme, when doubles of criminal letters are given to the parties defenders, "that upon the verie double of the letters the list of the witness and "assizers' names be written, either on the end or the back thereof, and "not on papers apart."

[2] The cases here provided for are proper summary trials, as distinguished from trials on a criminal libel without a jury.

[3] Hume, ii. 127, 128 and 134, note 1.

[4] Hume, ii. 69. No inferior Judge can pronounce sentence of fugitation or grant warrant for putting to the horn.

caution has been found or not, the Sheriff may (if the nature of the case admit of it) further proceed to consider the relevancy of the libel, and admit the same to the pursuer's probation, and to pass such sentence as may be pronounced against a person in absence.[1]

REGULATIONS, &c. Compare Act of Adjournal, ch. 5, sec. 2.

"XII. That upon the day of compearance the defender shall either give in all his defences in writing, or shall make answer *viva voce* to the facts contained in the libel; and upon advising the libel and defences, the Sheriff shall either pronounce an interlocutor upon the relevancy,[2] or, in case of difficulty, shall ordain informations to be given in.[3]

"XIII. That after pronouncing interlocutor upon the relevancy, the Sheriff shall forthwith proceed to examine the witnesses adduced *hinc inde* upon the facts admitted to probation; but probation by oath of party shall not be allowed in any case where the fact referred has turpitude in it, or where the consequence may be more than pecuniary."

Sentence.

"XIV. That if, upon advising the proof, the Sheriff shall find the defender guilty of what he is charged with, he shall fine, incarcerate, or inflict corporeal punishment according as the circumstances of the case require, and shall in all cases grant warrant for imprisoning the defender until he shall make payment of the sums decerned against him, or till the day assigned for inflicting the corporeal punishment."

The remaining regulations relate to the execution of sentences inflicting capital or corporeal punishment, the preparation of informations by the Sheriff,

[1] The practice of proceeding in absence of the accused, which, as this regulation shows, obtained pretty extensively, was expressly condemned as irregular in the case of *Macalister and Others*, June 22, 1812, in which the Court found and declared "that in criminal process no judgment of conviction "or punishment can be regularly pronounced except in presence of the pannel, "and that any practice adverse to this rule ought to be corrected."—Hume, ii. 68, note 3. But the pannels were not allowed expenses in the inferior Courts, "in respect a usage has crept into the Sheriff Court of Lanarkshire "of giving forth sentences while pannels were not present and attending "in Court."—Hume, ii. 134, note 1. Sections 7 and 15 of the Summary Procedure Act, 1864, provide for and regulate procedure in absence where the complaint concludes for a pecuniary penalty only in the first instance, or the special Act authorises procedure without the presence of the respondent.

[2] By 20 Geo. II., cap. 43, section 41, which relates to trials in the Court of Justiciary, informations on the relevancy of the libel and defences were dispensed with, except in cases of difficulty, but the pannel was required to "give in to the Clerk of Court the day before the trial, in writing, subscribed by the pannel or one of his procurators, such account of the "facts relating to the matters charged on him in the libel or indictment, "and thereto briefly subjoin the heads of such objections and defences as "he shall think fit or be advised to make at his trial."—Hume, ii. 301.

[3] See 20 Geo. II., cap. 43, section 42, which also relates to trials in the Court of Justiciary.

REGULATIONS FOR THE SHERIFF AND STEWART COURTS, 1752.

and the transmission thereof, with the writs and other evidence of proof, and lists of assize, to the Lord Justice-Clerk or his deputes, in terms of 8 Anne, cap. 16; and lastly, to the execution of the Porteous Roll,[1] and attendance of the Sheriff or his substitute and officers at the Circuit Court, with the roll and executions thereof.

In these regulations three modes of trial are well defined—Trials by Jury, in Regulations II. and III.; Trials without a Jury on a Criminal Summons, in Regulations IV. *et seq.*; and Summary Trials, in Regulation VIII.

PROCEDURE 1748-1827.

From 1748 till 1827 the procedure in the Sheriff Court was not altered to any great extent. Being modelled on that of the Court of Justiciary, it was affected more or less by the changes which from time to time took place in the latter. But as the rules prescribed in the Statute 1672 were held to apply only to the superior Court, considerable latitude existed in the practice of many Sheriff Courts in regard to the length of *induciæ* allowed, the signing of indictments, lists of witnesses and assize, service of the libel, procedure in absence of the accused, and other matters. The following passage in Hume (ii. 66) gives a very succinct account of the form of process before the Sheriff during the 18th and the beginning of the 19th century:—

"The form of process before the Sheriff in "criminal cases is various, according to the nature "of the charge and the conclusions of the libel. "For petty offences, punishable with fine only or "damages, or a short imprisonment, the usual "course is by a summary complaint or ordinary "summons at instance either of the Procurator-"Fiscal of Court, or of the party injured, with his

[1] Hume, ii. 25 and 26. By 9 Geo. IV., cap. 29, section 5, so much of the Statute 8 Anne, cap. 16, "as relates to punishment of crimes to be tried "in the Circuit Courts, and the transmission of the same, with writs and "evidence, to the Lord Justice-Clerk or his deputies," is repealed, and crimes are now tried on Circuit by indictment in the same manner as before the High Court of Justiciary at Edinburgh.

"concourse; and on these the manner of proceed-
"ing by written debate and allowance of proof is
"not materially different from that in civil actions.

PROCEDURE 1748–1827.

"In cases of somewhat a higher kind, where the
"prosecutor concludes for a long imprisonment, or
"banishment from the country, or other the like
"serious penalty, a libel is often employed (akin to
"the criminal letters used in the Court of Justiciary)
"which calls the accused to a day of trial on reason-
"able *induciæ* according to the custom of the Court,
"and grants warrant for the citation of witnesses
"as contained in a list which is signed by the pro-
"secutor and subjoined to the libel, and served on
"the pannel along with it. In this form of action
"the whole debate and proof are intended to take
"place at a single diet mentioned in the libel and
"citations; and, therefore, if the accused mean to
"examine witnesses on his part, he has to apply to
"the Clerk of Court for a precept of exculpation.

"Again, in cases of importance, where the Fiscal
"concludes for such pains as cannot lawfully be
"awarded without a conviction by the verdict of an
"assize, the course of trial is by a proper indict-
"ment, as before the Lords of Justiciary; whereof
"the pannel is served with a copy, together with a
"list of witnesses signed by the Fiscal, and a list of
"assize signed by the Sheriff. According to the cus-
"tom of some counties the indictment also is signed
"by the Sheriff (though this seems more proper for
"the Fiscal), and the diligence for citing witnesses
"is signed by the Sheriff and the Clerk of Court.
"But although these forms are usually observed in
"cases of moment, and the pannel is often allowed
"his *induciæ* of fifteen days to answer to the
"charge, yet still it is to be noted that the rules of
"criminal procedure prescribed in the Statute 1672
"were intended only for the supreme Court, and
"not for the inferior Judges. So that a deviation
"in any of those particulars is not to be pleaded
"peremptorily, as a nullity of the process, if matters

PROCEDURE 1748-1827.

"are truly conducted in a fair and equitable "way."

It sufficiently appears from Hume (ii. 67-69), and the cases mentioned in the notes to those pages, that the practice in criminal causes varied considerably in different inferior Courts; and further, that irregularities in several important particulars had crept into and long been tolerated in the criminal procedure of these Courts. There thus existed a strong necessity for the introduction of uniformity of procedure and the suppression of such irregularities, which could only be effected by statutory regulation.

In the year 1815 a Royal Commission was appointed to inquire into the duties, salaries and emoluments of the several officers, clerks and ministers of justice, and to report what regulations should be established respecting the same. The Commissioners, *inter alia*, recommended that certain regulations with respect to fees and otherwise should be made in regard to the Sheriff or Steward Courts in Scotland. In order to carry these recommendations into effect the Statute 6 Geo. IV., cap. 23, was passed. It directs, requires and empowers the Court of Justiciary to regulate the fees to be paid in criminal causes in the Sheriff or Steward Courts, as also the course of proceeding in criminal causes before the same, by one or more Act or Acts of Adjournal, to be passed by them from time to time as they shall see cause.[1] And it was further enacted that every such Act of Adjournal, and the regulations thereby made, and the table of fees thereby established, should apply to and receive effect in the Courts of Royal Burghs in Scotland equally as in the Sheriff and Steward Courts.[2]

In virtue of the powers so conferred, the Court of Justiciary, on 17th March 1827, passed the following Act of Adjournal, which has the authority of an

[1] 6 Geo. IV., cap. 23, section 1. [2] *Ibid.*, section 7.

Act of Parliament.[1] It is given exactly as it stands in the Book of Adjournal.

"The Lord Justice-Clerk and Lords Commissioners of Justiciary having taken into consideration an Act passed in the 6th year of the reign of his present Majesty, entituled 'An Act for the better regulation of the Sheriff and Stewart and Burgh Courts of Scotland,' as also the Report of the Sheriffs of the shires of Edinburgh, Lanark, Fife, Perth and Aberdeen, commissioners appointed by the Court of Session in terms of the 3d section of the said statute, and the Form of Process drawn up by the said Sheriffs for criminal causes in the Sheriff Courts and Courts of Royal Burghs of Scotland, and having heard His Majesty's Advocate on behalf of the public, Do hereby, in terms of the 4th, 5th and 7th sections of the said statute, Enact and Declare that after the expiration of three calendar months after the first day of the next Session of Parliament, the following Form of Process, in criminal causes, shall be observed in the Sheriff or Stewart Courts, and in the Courts of the Royal Burghs of Scotland, viz.:—

ACT OF ADJOURNAL, 17TH MAR. 1827 Preamble.

FORM OF PROCESS

IN

CRIMINAL CAUSES

TO BE

OBSERVED IN THE SHERIFF COURTS

AND IN THE

COURTS OF ROYAL BURGHS

OF

SCOTLAND.

"CHAPTER I.

"LIBEL.

"1. The libel shall be drawn as nearly as possible in the form of criminal letters. It shall give notice of the articles, if any, to be produced in evidence; shall contain a warrant for citing witnesses; and shall be signed by the Clerk of Court. The diet of compearance shall be filled up before the libel shall be issued by the clerk, and on no account shall any libel be issued by the clerk with the diet of compearance blank. A list of the names and

Amended by 16 and 17 Vict., cap. 80, sec. 35, and Schedule (L).

[1] *Ibid.*, section 5.

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designations of the witnesses, signed by the prosecutor or the Clerk of Court, must be annexed to the libel.

"2. If the trial is to be by jury, the libel shall contain a warrant for citing assizers, and may conclude generally for the pains of law. A list of the assize shall be signed by the Sheriff or Magistrate, and shall be annexed to the libel and list of witnesses; and the accused shall be cited to compear to underlye the law at the diet of compearance specified in the libel, on *induciæ* of not less than fifteen free days, *i.e.*, exclusive of the day of citation and the day of compearance.

Amended by 16 and 17 Vict., cap. 53, sec. 35, introducing two diets of Compearance.

"3. If the trial is to be without jury, the libel shall conclude for fine, imprisonment, and banishment, or any of them, or other pains of law competent to be inflicted by the Sheriff or Magistrate without a jury; and the *induciæ* shall not be less than six free days.

"CHAPTER II.

"EXECUTION OF THE LIBEL, AND PRODUCTIONS BY THE PROSECUTOR.

"1. The officer shall deliver to the party accused, if he find him personally, a full and accurate double of the libel to the will,[1] and a list of the witnesses, and also a list of the assize when the trial is to be by jury.[2]

"2. If the officer do not find the party accused, he shall leave the double of the libel, and a list of the witnesses, and of the assize, if any, in the party's dwelling-house, with one of his family; and if entrance into the dwelling-house be not obtained, the officer shall affix the double of the libel, and a list of the wituesses, and of the assize, if any, to the most patent door of the dwelling-house; and in either of these cases, open proclamation must also thereafter be made at the market-cross of the head burgh of the county; and another double of the libel, and a list of the witnesses and of the assize must be there affixed.[3]

"3. The lists of witnesses and assize served on the party accused shall not be on papers apart, but shall be annexed to the double of the libel. It is not necessary that a copy of the signature of the prosecutor, or his procurator, should be annexed to the list of witnesses so served on the accused, or that a copy of the signature of the Sheriff or Magistrate should be annexed to the list of assize so served.

"4. The double of the libel, and the list of witnesses and list of assize

[1] That is, not including the will.

[2] See Act of Adjournal, 9th July 1821, and Hume, ii. 248 and 243, notes *b* and 2. See also, as to citation of the accused, the Statute 1555, cap. 33, and Hume, ii. 252, *et seq.*

[3] Statute 1555. cap. 33.

served on the accused, may be printed or written bookways, and shall be subscribed on each page by the officer executing the same, and shall have a short copy of charge and citation subjoined thereto. This copy of charge and citation shall contain the names and designations of the witnesses present at executing.[1]

Amended by 9 Geo. IV., cap. 29, sec. 6, and Schedule (A).

"5. The written execution returned by the officer shall be subscribed by him, and by the witnesses specially designed, in whose presence the citation was given. It shall set forth whether the double of the libel, and the lists of witnesses and assize, and short copy of charge and citation subjoined thereto, were served on the accused personally, or left at his dwelling-house with one of his family, which dwelling-house must be particularly designated in the execution, or whether he was otherwise cited; and if he was otherwise cited, the execution shall set forth the manner of citation. The execution shall also state that the double of the libel, and the lists of witnesses and assize served, were subscribed on each page by the officer.

Amended by 9 Geo. IV., cap. 29, sec. 7, and Schedule (B).

"6. The original libel,[2] list of witnesses and list of assizers, the executions against the accused, and against the witnesses and assizers, and also the articles to be produced by the prosecutor in the course of the trial, shall be lodged in the hands of the Clerk of Court not later than the day before the trial.

"CHAPTER III.

"Non-Compearance of either Party.

"1. If at any diet the accused appear, but the prosecutor fail to insist, the Sheriff or Magistrate may declare the diet to be deserted; and if the circumstances of the case require it, may award expenses to the accused, which may be thereafter recovered by all manner of legal diligence. If the prosecutor's absence be necessary, and the necessity be proved to the satisfaction of the Sheriff or Magistrate, he may excuse the same and continue the diet to a future time.

"2. When bail has not been found, if the party accused shall fail to appear at any diet, the Sheriff or Magistrate may grant warrant for apprehending and imprisoning him until he shall find sufficient bail to attend the whole diets of Court.

"3. When bail has been found, if the party accused shall fail to

[1] Section 6 of 9 Geo. IV., cap. 29, substitutes for the copy of citation a notice marked upon the libel, in form of Schedule (A), to be subscribed by the officer and *one* witness, and declares that "it shall not be necessary for "such officer to subscribe any other part of such copy of a libel."

[2] The principal or record copies of all criminal libels before the Sheriff Courts may be either written or printed, or partly written and partly printed, provided they are authenticated as before—16 and 17 Vict., cap. 80, section 33.

Act of Adjournal, 17th March 1827.

appear, the bail bond may be declared to be forfeited; and the Sheriff or Magistrate may grant warrant for apprehending the accused and committing him to jail till liberated in due course of law.

"CHAPTER IV.

"Letters of Exculpation and Productions by the Accused.

"1. The party accused, if he demand it, shall receive from the clerk letters of exculpation containing a warrant for citing witnesses, agreeably to a list signed by the accused or his procurator.[1]

"2. All articles to be founded on by the accused in the course of the trial, a written statement of the defence,[2] and a list subscribed by the accused, or his procurator, of the witnesses to be adduced on the part of the accused, shall be lodged in the hands of the Clerk of Court not later than the day before the diet of compearance; and the accused shall not be allowed to produce at the trial any articles which have not been so lodged, or to prove any special defence which has not been stated in writing and lodged as herein provided, or to examine any witnesses not insert either in a list lodged as herein provided, or in the list of witnesses for the prosecution, unless by special permission of the Court, asked and obtained on cause shown previous to the commencement of the trial.

"CHAPTER V.

"Of Procedure, Sentence and Execution.

Amended by 9 Geo. IV., cap. 29, sec. 17.

"1. In trials by jury the forms of the Court of Justiciary shall be observed, except that the evidence shall be taken down in writing, unless otherwise provided by the Legislature. All objections stated in the course of the proceedings, with the answers thereto, shall be entered on the record if required by the party against whom the judgment on the objection has been pronounced, or if the objection shall appear to the Sheriff or Magistrate of

[1] Witnesses may be cited in criminal causes or prosecutions for statutory penalties in any part of Scotland on the warrant of the Sheriff, 11 Geo. IV. and 1 Will. IV., cap. 37, section 8. See also 1 and 2 Vict., cap. 119, section 24. As to the citation of witnesses resident in England and Ireland, see 45 Geo. III., cap. 92, and 54 Geo. III., cap. 186, and notes to sections 8 and 9 of the Summary Procedure Act, 1864, *infra*.

[2] In practice this regulation is confined to special defences.

importance, and such as ought to be put upon record, though required by neither party.[1]

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"2. In trials without jury the whole proceedings are to take place, and the evidence shall be led, in presence of the parties and of the Judge who is to decide the cause, and the diet shall not be adjourned without reasons stated in the record.

"3. In all criminal trials, if the accused has any objection to the principal libel or list of witnesses, or to the double of the libel, or to the list of witnesses served, or to the manner in which the witnesses are designed either in the principal libel or the list served, or to the execution of the libel, or to the executions against witnesses, or any objection founded on discrepancy between the double of the libel or the list of witnesses served and the record, he shall be bound to state the same before the interlocutor of relevancy is pronounced, otherwise the objection cannot afterwards be received.

Amended by 9 Geo. IV., cap. 29, sec. 11, as to objections on account of error in name or designation of Witness.

"4. If the accused shall be found guilty, the Sheriff or Magistrate shall, on motion of the prosecutor, pronounce judgment.

"5. When a fine has been imposed or expenses awarded, the Sheriff or Magistrate may grant warrant to imprison the party convicted until the fine or expenses shall be paid.[2]

Amended by 9 Geo. IV., cap. 29, sec. 21.

"6. In pronouncing and executing sentences importing corporeal pains, the Sheriff or Magistrate must attend to the provisions of 11 Geo. I., cap. 26, section 10,[3] and the 3 Geo. II., cap. 32, section 2."[4]

See 11 Geo. IV. and 1 Will. IV., cap. 37, sections 1 and 2.

It will be observed that this Act of Adjournal does not contain any regulations applicable to trials on summary complaint, and this may perhaps account for the contentions of the suspenders in the

[1] This regulation was in part altered by section 17 of 9 Geo. IV., cap. 29. which enacts that in trials by jury it shall be competent for the Court of the Sheriff to proceed "without reducing into writing the testimony of any "such witness or witnesses, in the same manner and according to the same "rules as are observed in trials before the Court of Justiciary." But the Sheriff is bound to preserve and authenticate notes of the evidence, and exhibit the same if called for by the Court of Justiciary. See *infra*, pp. 17 and 31.

[2] Warrants of imprisonment for payment of penalty or finding of caution must now specify a period at the expiry of which the person sentenced shall be discharged, notwithstanding the penalty shall not have been paid or caution found.—9 Geo. IV., cap. 29, section 21.

[3] Which provides that no sentence inflicting capital punishment or demembration pronounced south of the Firth of Forth shall be put in execution within less than thirty days, and if pronounced north of the Firth of Forth, within less than forty days after date of sentence. This provision was altered by 11 Geo. IV. and 1 Will. IV., cap. 37, sections 1 and 2, to the effect that the interval in the former case should be not less than fifteen or more than twenty-one days, and in the latter not less than twenty or more than twenty-seven after the date of sentence.

[4] Which provides that no sentence importing corporeal punishment less than death or demembration shall be put in execution within less than twelve days after the date of sentence.

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cases of *Knox* v. *Ramsay*,[1] and *Byrnes and others* v. *Dick*,[2] to the effect that apart from the provisions of sections 19 and 20 of 9 Geo. IV., cap. 29, the Sheriff could only try cases without a jury on a criminal libel, with *induciæ* of 6 days, taking down the evidence in writing, &c.

It will also be observed that the Act does not so much introduce new procedure as regulate procedure already in existence, though not perhaps in observation.

6 GEO. IV. CAP. 22, JURY ACT.

It may be observed in passing that on 20th May 1825, the same day as that on which the Act 6 Geo. IV., cap. 23, was passed, there was passed the Act 6 Geo. IV., cap. 22, which is the ruling Act as to the qualification, enrolling and choosing of jurors in criminal trials.

9 GEO. IV. CAP. 29.

The next Procedure Act is the important Statute 9 Geo. IV., cap. 29 (19th June 1828), commonly called Sir William Rae's Act. While it effects some important alterations in procedure, this Act, like the Act of Adjournal of 17th March 1827, for the most part declares and regulates procedure already existing. It contains the following provisions bearing on our present subject :—

Citation of the Accused, and of Jurors and Witnesses.—Instead of a short copy of citation being left with the accused, every service copy of a criminal libel shall have marked on it a Notice of Compearance in the form provided in Schedule (A),[3] signed by the officer and *one* witness; and it

[1] H. C., July 7, 1837, 1 Swin. 517.
[2] H. C., Feb. 23, 1853, 1 Irv. 145.

[3] SCHEDULE (A).

FORM OF NOTICE.

A B,—Take Notice that you will have to compear before the High Court of Justiciary (or other Court to be specified), to answer to the criminal libel against you, to which this notice is attached, on the day of , at of the clock.

This notice served on the day of , by me .

E F, *witness*. C D, *macer* (or other officer of the law).

[As the will of the libel now contains two diets of compearance (16 and 17 Vict., cap. 80, section 35), the notice of compearance must also contain the days fixed for the two diets].

is not necessary for the officer to subscribe any other part of such copy libel. This applies to the service of all criminal libels in Scotland.[1] 9 Geo. IV., cap. 29.

It is not necessary that at the time of service or citation of panel, juror, or witness, the officer be possessed of the warrant of citation. A short form of execution of citation is provided in Schedule (B).[2] The execution need not be produced unless sentence of fugitation or forfeiture of a bond of caution is moved for; but it may be exhibited to disprove objections to service, and the officer and witness may give evidence respecting service, although not included in the list of witnesses served on the accused.[3]

All service copies of criminal libels, and all notices of compearance or attendance, and executions of citation, may be either printed or in writing, or partly both.[4]

Charge of Art and Part.—"When the charge of "art and part is set forth at the outset of a criminal "libel, it shall not be necessary to repeat that "charge in the latter part thereof, according to the "form usually observed in the clause commencing "with the words 'at least,' and that it shall be com-"petent altogether to omit the said clause, any law "or practice to the contrary notwithstanding."[5]

[1] Section 6.

[2] SCHEDULE (B).

EXECUTION OF CITATION.

A copy of a criminal libel, containing a charge of theft (or whatever the crime may be), consisting of pages, and having annexed to it a list of witnesses and of assize (when the trial is to be by jury), was on the day of , served by me upon (J K), by delivering the same to him personally (or as the case may be), on which copy was marked a notice of compearance, on the day of .

E F, *witness.* A B *macer* (or other officer of the law).

[3] Section 7.

[4] Section 8. Section 7 of 11 Geo. IV. and 1 Will. IV., cap. 37, authorises the citation of jurors and witnesses by any officer of the law duly authorised without witnesses, in any cause or legal proceeding, civil or criminal, and the oath of the officer is sufficient evidence of citation. Jurors are now cited in criminal cases by registered post letter, 31 and 32 Vict., cap. 95, section 10.

[5] Sec. 9. For the history of the charge of "art and part" see Hume, ii. 225, *et seq.* The insertion of the words "art and part" is made a statutory requisite

9 Geo. IV., cap. 29.

Objections to the Citation of Witnesses and Jurors.—It is not competent to object to any juror or witness on the ground of such juror or witness appearing without citation, or without having been duly cited.[1]

If the accused can establish that he has been unable to find a witness, owing to an error in the name or designation of the witness as given in the list served along with the libel, or that he has been misled or deceived in his enquiries concerning such witness, the Court shall give such remedy as may be just, provided the objection is stated before the jury is sworn; but no objection of that description shall be afterwards received.[2]

On Pleading.—It is not necessary to read over the libel before proceeding to trial if the accused says that he means to plead *not guilty*, and that he does not desire the libel to be read over.[3]

When the accused pleads *guilty*, sentence may be pronounced without the interposition of a jury, in the same manner as if a verdict of guilty had been returned. But the plea of guilty must be made in open Court, and then and there subscribed by the

in all criminal libels by the Act 1592, cap. 153. At first the charge of "art "and part" was introduced only at the close of the libel, but at length it became customary to introduce it also at the beginning of the minor. Baron Hume says (ii. 238), "It is not, perhaps, very necessary to observe "that the style of libel now in use truly contains a double charge of art "and part, one at the outset of the minor proposition: 'Yet true it is and "'of verity that you are guilty of the foresaid crime, actor or art and part,' "and another at the close of the libel in the words which were formerly "set down. The charge would, however, be good (though the other form "is more regular) if it were made but once at the close of the libel only." In regard to the "at least" clause he says (ii. 235), "After setting forth "the *corpus delicti*, with the necessary circumstances or such leading "characters of the story as the prosecutor chooses to add, he concludes "with the general charge of art and part, thus: 'At least time and place "'foresaid the said A B was murdered (or robbed, as the case happens to "'be) in manner foresaid, and you are guilty of the foresaid murder, "'actor or art and part.' Whereupon the Court find an interlocutor of "relevancy in general terms." The charge of art and part must still be inserted in the libel, and this section merely declares (what was at one time both the law and the practice) that it is unnecessary to insert it twice.

[1] Section 10. See also 1 & 2 Vict., cap. 119, section 24.

[2] Section 11.

[3] Section 12.

panel or his procurator, and authenticated by the signature of the Judge.[1] 9 Geo. IV. cap. 29.

Of Verdicts.—Verdicts in writing are discontinued in all cases when the verdict is returned before the Court adjourns;[2] but the verdict must still be in writing, should the Court so direct, if the Court adjourns before the verdict is returned. For the former enactments on the subject see the Statutes 54 Geo. III., cap. 67, and 6 Geo. IV., cap. 22, section 20; Alison, ii. 637; and Hume, ii. 423.

Of Procedure during Trial.—The provisions on this head are so important that the sections are quoted in full.

1. *In trials by Jury before the High Court of Admiralty and Sheriff Court.*

"XVII. And be it enacted that it shall and may be lawful for the High Court of Admiralty, and for the Court of the Sheriff[3] respectively to proceed in, try and determine, all causes and prosecutions for crimes before them where the trial is by jury, by verdict of such jury, upon examining and hearing the evidence of the witness or witnesses in any such cause or prosecution, *viva voce*, without reducing into writing the testimony of any such witness or witnesses,[4] in the same manner and according to the same rules as are observed in trials before the Court of Justiciary; and it is hereby provided that the Judge trying such causes or prosecutions shall preserve and duly authenticate the notes of the evidence taken by him in such trial, and shall exhibit the same or a certified copy thereof, in case the same should be called for by the Court of Justiciary."

2. *In Trials of Crimes before the Sheriff or other inferior Court in Scotland without a Jury.*

"XVIII. And be it enacted, that in trials of crimes before the

[1] Section 14. Pleading diets, to which the witnesses and assize are not summoned, were first introduced by the Sheriff Court Act, 1853, 16 and 17 Vict., cap. 80, section 35, which is quoted *infra*, p. 23.

[2] Section 15.

[3] This provision does not extend to the other inferior Courts; but trials by jury never now take place in them.

[4] The depositions previously formed part of the record. They were taken down in writing by the clerk to the dictation of the Sheriff, and were signed by the witnesses. Now only the names of the witnesses are entered in the record as having been examined. See *infra*, p. 31.

9 Geo. IV. cap. 29.

Sheriff or other inferior Court in Scotland, without a jury,[1] no part of the proceedings which is not in use to be taken down in writing in trials by jury shall be so taken down, excepting only the depositions of witnesses."

3. *In Summary Trials before Sheriffs of Counties.*

"XIX. And be it enacted, that in the prosecution of criminal offences before Sheriffs of counties in Scotland where the prosecutor shall in his libel conclude for a fine not exceeding Ten pounds, together with expenses, or for imprisonment in gaol or in bridewell not exceeding sixty days, accompanied, when necessary, with caution for good behaviour, or to keep the peace for a period not exceeding six months, and under a penalty not exceeding Twenty pounds, it shall and may be lawful to proceed to try such offences in the easiest and most expeditious manner, without the pleadings or evidence being reduced into writing; provided always that a record shall be preserved of the charge and of the judgment, including the names of the witnesses examined on oath, unless where the accused pleads guilty, which shall be made to appear; and the said record shall also set forth, if the prosecutor or accused party desire it, any offer of proof made by either of those parties and refused to be admitted; and likewise, if so desired, any objections to the admissibility of evidence sustained or repelled by the Court, which record shall be in the form contained in the schedule annexed to this Act, and there designated by the letter C.[2]

Amended by 11 Geo. IV., and 1 Will. IV., cap. 37, secs. 4 and 5, as to adjournment and noting of productions.

"XX. And be it enacted, that the Sheriff so trying any such offence shall preserve a note of the evidence taken by him on such

[1] This relates to trials on a criminal libel, with six days *induciæ*, being the trials regulated by the Act of Adjournal of 17th March 1827, ch. 1, sections 1 and 3, and ch. 5, section 2. See opinion of the Lord Justice-General (Inglis) in *Bute and Spouse* v. *More*, 1 Couper, 513, 574.

[2] SCHEDULE (C).

1. Libel.

Unto the Sheriff of the county of , the complaint of the Procurator-Fiscal of Court (or other party with his concurrence).

Humbly sheweth—

That (J K) has been guilty of the crime of theft (or other crime), actor or art and part, in so far as on the day of , or about that time, he did (here state the particulars of the offence, specifying particularly the place where the crime was committed). May it therefore please your Lordship to grant warrant to apprehend the said , and bring him before you (or to cite him to appear before you) to answer to this libel, and thereafter to (here specify the punishment concluded for). According to Justice.

A B.

2. Deliverance on Libel.

At 18 .

The Sheriff having considered this libel, grants warrant to officers of Court to apprehend the above designed (J K), and to bring him (or to cite him to appear) to answer the same, and also to cite witnesses for both parties.

(*When stolen goods or the like are to be searched for this will be included in the libel and warrant*).

C D.

trial, and shall exhibit the same, or a certified copy thereof, in case the same should be called for by the Court of Justiciary." 9 Geo. IV. cap. 29.

Warrants of Imprisonment.

"XXI. And be it enacted, that all warrants of imprisonment for payment of penalty, or for finding of caution, shall specify a period at the expiry of which the person sentenced shall be discharged, notwithstanding such penalty shall not have been paid or caution found."

These sections contain the most important provisions in the Act. In particular, sections 19 and 20 define and regulate the exercise of the Sheriff's summary jurisdiction, which was passed over in silence in the Act of Adjournal of 17th March 1827. But as farther regulations were made by subsequent statutes, comment is, in the meantime, reserved.

Those made by 11 Geo. IV. and 1 Will. IV., cap. 37, are as follows :—

Procedure in Summary Causes.—Section 4 of 11 Geo. IV. and 1 Will. IV., cap. 37, provides that on the prosecution of criminal offences before Sheriffs of counties, according to the summary form provided by sections 19 and 20 of 9 Geo. IV., cap. 29, the person accused, when first brought before the Sheriff, shall be entitled, at any time before the 11 Geo. IV. and 1 Will. IV. cap. 37.

3. Procedure.

At 18 .—Compeared the said J K, and the libel being read over to him, he answers that J K.
C D.

If the accused pleads not guilty, or the case be not concluded at the first diet, the Sheriff adjourns the diet to at , and in the meantime grants warrant to incarcerate the said J K in the tolbooth of , to be detained till that time, or until he finds caution, to appear at all future diets of Court under a penalty of . C D.

At 18 .—Compeared the said J K. The witnesses after named were examined upon oath in support of the libel, *videlicet*, . G H.
L M.

And the witnesses after named were examined on oath in exculpation, *videlicet*, . N O.
P Q.

4. Sentence.

The Sheriff finds ; and therefore (here add terms of sentence). C D.

11 Geo. IV. and 1 Will. IV. cap. 37.

examination of any witness upon the trial shall have commenced, to require a copy of the libel against him, and that his trial shall be adjourned for a space not less than forty-eight hours after such copy shall be served upon him; and that no such requisition shall be competent where a copy of the libel shall have been served upon the accused at least forty-eight hours before the trial.

This provision was necessary and proper, as in such summary causes not even service of the complaint is required by Sir William Rae's Act.

It is provided by section 5 that, with the exception just mentioned, no adjournment shall take place when the accused pleads not guilty, or at any other stage of the trial, unless the Sheriff shall see cause to authorise such adjournment.

When the declaration of the accused, or other evidence different from parole testimony, shall be adduced, the production thereof in evidence shall be marked in the record of the trial.[1]

Transmission of Prisoners.—Any officer of the law, when lawfully conveying any prisoner to any gaol or before any Magistrate, may convey the prisoner through any county adjoining that over which the Magistrate before whom the prisoner is to be carried for examination possesses jurisdiction, or adjoining to that in which the gaol is situated to which the prisoner is to be committed, in all respects as if he were an officer of the county through which he may pass, and as if the warrant under which he is acting had been granted or indorsed by a Magistrate of such county.[2]

Citation of Jurors and Witnesses.—Jurors and witnesses may be cited by any officer of the law duly authorised, without witnesses.[3]

Section 8 is as follows:—"And be it enacted, "that when the attendance of any person shall be

[1] Sec. 5. [2] Sec. 6.

[3] Jurors are now cited by registered post letters—30 and 31 Vict., cap. 96, section 10.

"required as a witness in any criminal cause or "proceeding,[1] or in any prosecution for a pecuniary "penalty before any Court or Magistrate in Scot-"land, such person, although not residing within "the jurisdiction of the Court or Magistrate grant-"ing the warrant of citation, may be cited on the "warrant of such Court or Magistrate, and this "either by a messenger-at-arms, or by an officer of "the Court or Magistrate granting the warrant, or "by an officer of the place in which such person "may be for the time; and such citation shall be "sufficient to enforce the attendance of such person "as a witness in all respects, as if such person had "been resident within the jurisdiction of the Magis-"trate by whom such warrant shall have been "granted; and further, that any sentence or decree "for any pecuniary penalty or expenses pronounced "by any Court or Magistrate may be enforced "against the person or effects of any party against "whom any such sentence or decree shall have "been awarded in any other county, as well as in "the county where such sentence or decree is pro-"nounced: Provided always that such sentence or "decree, or an extract thereof, shall be first pro-"duced to and indorsed by a Court or Magistrate "of such other county competent to have pro-"nounced such sentence or decree in such other "county." 11 Geo. IV. and 1 Will. IV. cap. 37.

This enactment renders unnecessary the indorsation of such warrants of citation, or the obtaining of letters of supplement from the Court of Justiciary.[2]

The Sheriff Court Act, 1838 (1 and 2 Vict., cap. 119), contains further provisions for the citation of parties and witnesses, without having recourse to letters of supplement. 1 and 2 Vict., cap. 119.

It is enacted by section 24 that it shall be competent to cite all persons within Scotland, as

[1] This includes precognition—Alison, ii. 402.

[2] Alison, ii. 401.

1 AND 2 VICT., CAP. 119.

parties or as *witnesses* in any civil or criminal action or proceeding in any Sheriff Court, by the warrant of such Sheriff Court, indorsed by the Sheriff-clerk of the sheriffdom in which it is executed; and there is a similar provision as to the execution of letters of second diligence.

And section 25 enacts that criminal warrants granted by the Sheriff against any person charged with having committed a crime or offence within the Sheriff's jurisdiction, shall be sufficient for the apprehension within any other county, and disposal of the accused, in terms of the warrant, without its being backed or indorsed by any other Magistrate; provided the warrant is executed by a messenger-at-arms, or an officer of the Court where the same was issued.[1]

16 AND 17 VICT., CAP. 80.

The Sheriff Court Act, 1853, 16 and 17 Vict., cap. 80, contains the following provisions as to criminal procedure:—

As to the Libel.

"33. And in respect of criminal prosecutions before the Sheriff, be it enacted as follows:—

"The principal or record copies of all criminal libels before the Sheriff Courts may be either written or printed, or partly written and partly printed, provided that the same shall be authenticated in the same manner as the written criminal libels now in use are authenticated.

"34. When a criminal libel in any Sheriff Court is either wholly or partly printed, a copy of it either wholly or partly printed shall, instead of being copied in writing into the Record-Book of Court as at present, be inserted in such book, either in its proper place in the body thereof, or at the end of the volume wherein the relative procedure is recorded, in which last case it shall be distinctly referred to as so appended."

Pleading Diets in Trials by Jury.—Section 35 contains an important amendment in criminal pro-

[1] This provision only applies to the Sheriff Court; in all other cases in which the accused is beyond the jurisdiction of the Judge or Magistrate, the warrant must be indorsed by a Magistrate of the place where it is sought to apprehend the accused.—Hume, ii. 78, 79; Alison, ii. 125.

cedure, viz., the introduction of pleading diets. Formerly in trials by jury there was only one diet of compearance, to which not only the accused but also witnesses and forty-five jurymen were cited. If the accused pleaded guilty, the attendance of, and expense of bringing, witnesses and jurymen, were thrown away; as by 9 Geo. IV., cap. 29, section 14, a jury was not necessary, and the witnesses were, of course, not required. Accordingly it is enacted that— 16 AND 17 VICT., CAP. 80.

"35. In the prosecution of all criminal offences which shall not be tried summarily,[1] the will of the criminal libel shall contain two diets of compearance, in the form of the Schedule (L) hereunto annexed; and at the first of such diets, which shall not be sooner than five days from the service of the libel, the Court sitting in judgment shall call upon the accused party to plead guilty or not guilty to the crime of which such party may be therein accused;[2] and if such party shall plead guilty, the Court shall forthwith pronounce sentence upon such party according to the form now in use; and if the party accused shall plead not guilty, the trial of such party shall take place on the second diet of compearance set forth in the will of the libel, which second diet shall not be sooner than nine clear days after the first diet, and at such second diet the party accused shall again be called upon to plead as aforesaid; and if such party shall then plead guity, the sentence of the law shall be forthwith pronounced according to the form now in use; and if such party shall plead not guilty, a jury shall then be empannelled,[3] and the trial shall proceed and be followed out according to law, unless the diet shall be further adjourned or deserted according to the existing law and practice."

Section 36 is as follows:—"It shall not be necessary for the

[1] This enactment, although it bears to apply to all cases not tried summarily, can only apply, it is thought, to trials by jury, because the *induciæ* here prescribed are inapplicable to trials on a criminal libel with six days *induciæ*. The words *tried summarily* must therefore be read as distinguished from *tried with a jury;* perhaps the mode of trial without a jury on a criminal libel may have been overlooked, having been long in disuse.

[2] Although divided into two diets, the procedure remains to all practical effects continuous. Therefore all objections to the relevancy of the libel must be disposed of once for all at the first diet, before the accused is called on to plead, and cannot competently be stated at the second diet.—*Smith* v. *Lothian*, H. C., Mar. 21, 1852, 4 Irv. 170; and it is not competent to advocate an interlocutor holding the libel relevant.—*Jamieson* v. *Lothian*, H. C., Dec. 3, 1855, 2 Irv. 273. All pleas in bar of trial, and objections to citation of the accused, must also be stated at the first diet.

[3] Under this statute it is not essential that there should be an interlocutor remitting the panel to the knowledge of an assize.—*Christie* v. *Simpson*, H. C., May 28, 1855, 2 Irv. 432.

16 AND 17 VICT., CAP. 80.

Sheriff at each such diet to ask the party accused more than once whether such party pleads guilty or not guilty."

In regard to the older practice of calling upon the accused to plead both before and after the interlocutor of relevancy, Lord Neaves, in the case of *Smith* v. *Lothian*,[1] made the following instructive remarks :—

"In old practice a panel was interrogated twice "whether he was guilty or not guilty,—first, before "the interlocutor of relevancy was pronounced, "and secondly, afterwards. The first interrogation "and plea had this effect, that the panel by plead-"ing gave up all objections to the jurisdiction of "the Court and the regularity of the citation. "After the panel had thus pleaded to the merits "he could not object that he was not competently "called before a competent Court. It was the "practice to record that plea, but not to authen-"ticate it. The interlocutor of relevancy was then "pronounced, and the panel was again interro-"gated. Then, if a plea of guilty was returned it "was recorded, and in our earlier practice the jury "returned a verdict in terms of the panel's con-"fession. The practice, though previously changed "in the supreme Court, was not altered in the "Sheriff Court till the late Sheriff Court Act. By "it the double interrogatory was dispensed with. "When a plea of guilty is returned under the "recent Act on which sentence may follow, which "takes place at the first diet, all questions of juris-"diction, competency of citation and relevancy, "must necessarily be previously disposed of. The "object of the statute was to prevent discussion "on legal questions at the second diet, and to leave "nothing for the second diet except the examina-"tion of the witnesses and the trial of the cause. "The panel is then allowed a second opportunity "of pleading guilty, often a most desirable thing

[1] 4 Irv. 174, 175.

"for him, as preventing exposure to the Court of "all the details of his crime." 31 AND 32 VICT., CAP. 95.

By section 10 of the Court of Justiciary Act, 1868, 31 and 32 Vict., cap. 95, it is enacted, that the "present mode of citing jurors for the trial of "criminal cases before the High Court or Circuit "Court of Justiciary, or before any Sheriff in Scot-"land, shall be discontinued;" and it is provided that jurors shall be cited by registered post letter, a certificate of citation in this manner under the hand of the Sheriff-clerk, or his depute, being declared to be equivalent to an execution of citation.

Section 18 is as follows:—"All bail-bonds what-"soever, received in order to the liberation of ac-"cused persons from custody, shall specify the "domicile at which such persons may thereafter be "cited for trial before the Court of Justiciary or "any other criminal Court in Scotland; and it "shall not be necessary to cite any person liberated "under such bail-bond edictally at the market "cross of the head burgh of the shire."

SKETCH OF PROCEDURE.

The following is a sketch of the result of these successive enactments and regulations in so far as regards procedure in criminal trials in the Sheriff Court:—

I. IN TRIALS BY JURY.

The Original Libel, Lists of Witnesses and Assize, &c.—The libel is drawn in the form of criminal letters (running in the name of the Sheriff of the county), and must be prepared with as much care and precision as an indictment in the Court of Justiciary. It concludes generally for the pains of law;[1] the charge of "art and part" need only be inserted at the outset of the minor.[2] The libel must give notice of the productions and articles to be used

[1] Act of Adjournal, 17th March 1827, ch. 1, secs. 1 and 2.
[2] 9 Geo. IV., cap. 29, sec. 9.

SKETCH OF PROCEDURE.

in evidence, including the declaration of the accused.[1]

The will of the libel contains two diets of compearance. Warrant is granted to cite the accused to compear personally to underlye the law for the first diet on a day not sooner than five days from the service of the libel, there to plead guilty or not guilty; and also, if required (that is, if he pleads not guilty), to compear for the second diet on a day not sooner than nine clear days after the first diet.[2] The will also contains warrant for summoning an assize of not fewer than forty-five persons, and the prosecutor's witnesses for the second diet if required.[3] The diets of compearance must be filled up before the libel is issued by the clerk.[4]

The libel is signed by the Clerk of Court.[5] A list of the names and designations of the witnesses, signed by the prosecutor or Clerk of Court, is annexed to the libel;[6] and a list of the assize, signed by the Sheriff, is annexed to the libel and list of witnesses.[7]

The principal or record copy of the libel may be either written or printed, or partly both; and when it is either wholly or partly printed, a copy of it, either wholly or partly printed, is inserted in the Record-Book of Court, either in its proper place in the body thereof, or at the end of the volume; in the latter case it must be distinctly referred to as appended.[8]

Citation of the Accused.—The officer need not have the warrant of citation with him at the time of service;[9] he delivers to the accused personally, if he can be found, a full and accurate double of the libel (with the exception of the will), and a list of witnesses, and a list of the assize. These lists must

[1] Act of Adjournal, ch. 1, sec. 1.
[2] 16 and 17 Vict., cap. 80, sec. 35, and Schedule (L).
[3] *Ibid.* [4] Act of Adjournal, ch. 1, sec. 1. [5] *Ibid.*
[6] *Ibid.* In practice this list is signed by the prosecutor.
[7] *Ibid.*, ch. 1, sec. 2. [8] 16 and 17 Vict., cap. 80, secs. 33, 34.
[9] 9 Geo. IV., cap. 29, sec. 7.

be annexed to the double of the libel, but need not bear copies of the signatures of the prosecutor and Sheriff respectively.[1] Service copies of the libel, and lists of the witnesses and assize, may be either printed or written, or partly both.[2]

SKETCH OF PROCEDURE.

On every copy libel served a notice of compearance is marked, containing the dates of the two diets of compearance. This notice is subscribed by the officer and one witness, but the officer need not subscribe any other part of the service copy libel.[3]

If the officer does not find the accused, and if the accused has not been liberated on bail, he leaves a double of the libel and the said lists in the accused's dwelling-house, with one of the family, or affixes them to the main-door of the house if he cannot obtain entrance; and in either of these cases makes proclamation at the market-cross of the head burgh of the county, and there affixes another double of the libel and lists.[4]

If the accused has been liberated on bail, he is cited at the domicile named in his bail-bond, and need not be cited edictally at the market-cross of the head burgh of the shire.[5] The execution of citation is signed by the officer who serves, and *one* witness.[6]

If the accused is beyond the Sheriff's jurisdiction, but within Scotland, the warrant of citation must be indorsed by the Sheriff-clerk of the county in which service takes place.[7]

Citation of Jurors.—The Sheriff-clerk of the county, or his depute, fills up and signs a proper citation, addressed to each juror, and transmits the same in a registered post letter to the juror's place of residence, as stated in the roll of jurors. A certificate of such citation under the hand of the

[1] Act of Adjournal, ch. 2, secs. 1 and 3.
[2] 9 Geo. IV., cap. 29, sec. 8.
[3] *Ibid.*, sec. 6, and Schedule (A), and 16 and 17 Vict., cap. 80, sec. 35.
[4] Act of Adjournal, ch. 2, sec. 2.
[5] 31 and 32 Vict., cap. 95, sec. 18.
[6] 9 Geo. IV., cap. 29, sec. 7.
[7] 1 and 2 Vict., cap. 119, sec. 24.

SKETCH OF PROCEDURE.

Sheriff-clerk or his depute is held equivalent to an execution of citation.[1]

Citation of Witnesses.—The will of the libel contains warrant for citing the prosecutor's witnesses. The citation may be given by any officer of the law, without witnesses, and he need not have with him the warrant of citation. The Sheriff's warrant is effectual throughout Scotland, even beyond his jurisdiction, without backing or indorsation.[2] As to citation of witnesses in England and Ireland, see note 3 to section 9 of the Summary Procedure Act, 1864.

The accused, if he demands it, receives from the clerk letters of exculpation containing warrant for citing witnesses, agreeably to a list signed by the accused or his procurator.[3]

Lodging Productions, &c.—Chapter 2, section 6, of the Act of Adjournal directs that the prosecutor must lodge the original libel, list of witnesses and assizers, and the executions against the accused and witnesses, and certificates of citations of jurors, and also all articles to be produced in the course of the trial, in the hands of the Clerk of Court not later than the day before the trial; but as the accused is now required to plead at the first diet, and as all objections to his citation and the relevancy of the libel are then disposed of, at least the original libel and execution of citation against the accused should be lodged the day before the first diet.

The Act of Adjournal, chapter 4, section 2, provides that the accused must lodge all articles on which he proposes to found, a written statement of any special defence, and a list of witnesses, if any, subscribed by himself or his procurator, not later than the day before the diet of compearance; but as these productions are only required in the event of the trial proceeding, which cannot be until the second

[1] 31 and 32 Vict., cap. 95, sec. 10.
[2] 11 Geo. IV., and 1 Will. IV., cap. 37, secs. 7 and 8.
[3] Act of Adjournal, ch. 4, sec. 1.

diet, it is sufficient if they are lodged the day before the second diet.

SKETCH OF PROCEDURE.

Procedure at the first Diet.—If the accused does not appear, and has not found bail, the Sheriff may grant warrant for apprehending and imprisoning him until he finds bail to attend the whole diets of Court.[1] If he has found bail, the bail-bond may be declared to be forfeited, and warrant may be granted to apprehend and imprison the accused till liberated in due course of law.[2] This warrant may be executed in any part of the United Kingdom when duly indorsed,[3] and in any other county in Scotland without backing or indorsation.[4]

Though not present the accused may, through a procurator, state objections to citation;[5] and his cautioner may do so in bar of forfeiture of the bail-bond.[6]

If the accused appears, but the prosecutor fails to insist, the Sheriff may declare the diet deserted, and award expenses to the accused; or if the prosecutor's absence is proved to have been necessary, the Sheriff may excuse it and continue the diet.[7]

If neither party appears the libel falls, and the Sheriff cannot issue any warrant against the accused, or declare his bail-bond forfeited.

If both parties are present, all objections to citation of the accused, and pleas in bar of trial, such as insanity, want of jurisdiction, "tholed an "assize," &c., are first stated and disposed of. If none of these objections are sustained, objections to the relevancy of the libel are next stated and disposed of. If these objections are repelled or obviated by amendment of the libel, an interlocutor of relevancy is pronounced, and the accused is called upon to plead. If he pleads guilty the plea is recorded, and sentence is forthwith pronounced

[1] Act of Adjournal, ch. 3, sec. 2.
[2] *Ibid.*, ch. 3, sec. 3.
[3] Alison, ii. 350.
[4] 1 and 2 Vict., cap. 119, sec. 25.
[5] Alison, ii. 352.
[6] William Cook, H. C., July 16, 1832; 5 Deas and Anderson, 513.
[7] Act of Adjournal, ch. 3, sec. 1.

SKETCH OF PROCEDURE.

on the motion of the prosecutor.[1] The plea must be given in open Court, and then and there subscribed by the accused or his procurator, and authenticated by the signature of the Sheriff.[2]

If the accused pleads not guilty the case stands adjourned to the second diet.

If the second diet is not called, the only effect is that the instance falls, and the prosecutor is not thereby barred from proceeding with a second libel. Case of *Edward Tabram,* H.C., May 23, 1872, 2 Couper, 259.

Procedure at the Second Diet.—The accused is again called upon to plead,[3] and if he pleads guilty the plea is recorded, and sentence pronounced as above explained. All objections to the effect that the accused has been unable to find any witness in consequence of error in the name or designation of such witness as contained in the list served upon him, or that he has been misled or deceived in his enquiries regarding such witness, must be stated before the jury is sworn.[4] It is not competent to object to any juror or witness in respect of such juror or witness appearing without citation, or without having been duly cited;[5] but the accused may object to a juror if he is erroneously designed either in the record or service copy, or both;[6] but such objections must be made before the jury is sworn.[7]

If the accused says that he means to plead not guilty, and that he does not desire that the libel should be read over, it is not necessary to read the libel before proceeding to trial.[8]

If the accused pleads not guilty a jury is empannelled,[9] and the trial proceeds, and is conducted according to the rules of the Court of Justiciary. The evidence need not be reduced to writing, but

[1] 16 and 17 Vict., cap. 80, sec. 35.
[2] 9 Geo. IV., cap. 29, sec. 14.
[3] 16 and 17 Vict., cap. 80, sec. 35.
[4] 9 Geo. IV., cap. 29, sec. 11.
[5] *Ibid.*, sec. 10.
[6] Alison, ii. 388.
[7] 6 Geo. IV., cap. 22, sec. 16.
[8] 9 Geo. IV., cap. 29, sec. 12. In practice the libel is hardly ever read over, and the ceremony of ascertaining the accused's wishes on the subject is usually omitted.
[9] 16 and 17 Vict., cap. 80, sec. 35.

the Sheriff preserves and authenticates notes of the evidence for exhibition, if called for by the Court of Justiciary.[1] SKETCH OF PROCEDURE.

As the evidence is not now taken down in writing, "objections stated in the course of the proceed-"ings" are no longer entered on the record. There is no express statutory direction that the Sheriff shall note such objections, but it is right that he should do so, and I believe that, in practice, it is done when asked. Examples are given in the Appendix of the contents of the record in jury trials in the Sheriff Court according to the present practice.

The verdict is returned *viva voce* by the Chancellor of the jury, if given before the Court adjourns;[2] but if the Court adjourns while the jury is enclosed the Court may direct a written verdict to be returned.[3]

If the accused is found guilty the Sheriff pronounces sentence on the motion of the prosecutor.

II. In Trials without a Jury on a Criminal Libel.

The libel is also drawn in the form of criminal letters; it gives notice of articles to be produced, and concludes for fine, imprisonment and banishment, or any of them, or other pains of law competent to be inflicted by the Sheriff without a jury. It contains warrant for citing witnesses, and has annexed to it a list of witnesses.[4] The rules as to signing the libel and list of witnesses, the citation of the accused and witnesses, lodging productions and defences, and procedure generally before trial, are the same as in cases to be tried with a jury, except as regards summoning the jury, and in so far as there is only one diet of compearance instead of two.[5]

[1] 9 Geo. IV., cap. 29, sec. 17. [2] *Ibid.*, sec. 15.
[3] 6 Geo. IV., cap. 22, sec. 20.
[4] Act of Adjournal, 17th March 1827, ch. 1, secs. 1 and 3.
[5] See notes to 16 and 16 Vict., cap. 80, sec. 35, *antea*, p. 23.

SKETCH OF PROCEDURE.

The whole proceedings must take place, and the evidence must be led, in presence of the parties and of the Judge who is to decide the case, and the diet shall not be adjourned without reasons stated in the record.[1]

The depositions of the witnesses must be taken down in writing, but no other part of the proceedings which is not in use to be taken down in writing in trials by jury shall be so taken down.[2]

This mode of trial, although long in disuse, is still competent, and might, it is thought, be often used with advantage.

III. IN SUMMARY TRIALS.

The complaint, which serves both as information and libel, is signed by the prosecutor, and is in the form provided in Schedule (C) of Sir William Rae's Act. This form, though devoid of technicalities, contains a complete skeleton of a criminal charge,[3] and prays for warrant to apprehend or cite the accused, and concludes for a punishment which must not exceed the limits specified in section 19 of the statute. It is not necessary to give notice in the complaint of productions to be used in evidence, or to serve a list of witnesses on the accused.

The Sheriff having considered the complaint grants warrant to apprehend or cite the accused, and to cite witnesses for both parties, and, if necessary, to search for stolen goods or the like.

No *induciæ* need be allowed, and even citation is not required unless the Sheriff so directs. But if the accused has not been served with a copy of the complaint forty-eight hours before the trial, he may, when first brought before the Sheriff, and before

[1] Act of Adjournal, ch. 5, sec. 2.

[2] 9 Geo. IV., cap. 29, sec. 18, and see p. 17, note 4.

[3] On the form and requisites of the complaint, see notes to Schedule (A) of the Summary Procedure Act, 1864. Schedule (C) of Sir William Rae's Act is given on pp. 18 and 19, *supra*, note 2.

SKETCH OF PROCEDURE.

the examination of any witness upon the trial shall have commenced, require a copy of the complaint against him, and demand an adjournment of the trial for forty-eight hours after such copy shall be served upon him.[1]

On the accused compearing, the complaint is read over to him. If he pleads "guilty," the plea is stated on the record,[2] and sentence is pronounced. If he pleads "not guilty," the trial proceeds in the presence of the parties and of the Judge; and no adjournment is thereafter allowed except the Sheriff shall see cause to authorise such adjournment, the reason of which should be stated in the record.[3] The record also contains, in addition to the charge and judgment,[4] a note of—

1. The names of the witnesses examined on oath.[4]

2. If desired by either party, any offer of proof made and refused to be admitted.[4]

3. If so desired, any objection stated to the admissibility of evidence, and sustained or repelled by the Court.[4]

4. The production of the declaration of the accused, and any other evidence adduced on the trial "different from parole testimony."[5]

The pleadings and evidence need not be reduced into writing, but the Sheriff must preserve a note of the evidence and produce the same, or a certified copy thereof, if called for by the Court of Justiciary.[6]

All warrants of imprisonment for payment of penalty or finding of caution must specify a period at the expiry of which the person sentenced shall be discharged, notwithstanding such penalty shall not have been paid or caution found.[7]

[1] 11 Geo. IV. and 1 Will. IV., cap. 37, sec. 4.
[2] 9 Geo. IV., cap. 29, sec. 19.
[3] Act of Adjournal, 17th March 1827, ch. 5, sec. 2, and 11 Geo. IV. and 1 Will. IV., cap. 37, sec. 5.
[4] 9 Geo. IV., cap. 29, sec. 19.
[5] 11 Geo. IV. and 1 Will. IV., cap. 37, sec. 5.
[6] 9 Geo. IV., cap. 29, sec. 20. [7] *Ibid.*, sec. 21.

SKETCH OF PROCEDURE.

It is no easy matter to decide what cases should be tried with a jury and what without, and there is no precise rule on the subject; but the question is always one of importance, as the sentence may be set aside if a jury has been improperly dispensed with.

In judging of this the Court look to the nature of the charge, not the punishment concluded for. Not that it is incompetent for the prosecutor to have many cases tried summarily by restricting the conclusions of the complaint; but it is not every case which can be so dealt with, and it would be neither for the advantage of the community nor of the accused if the prosecutor possessed such a power.

On this subject, which is too important to be discussed shortly, see Alison, ii. 53-58; Hume, ii. 147, *et seq; Bute and Spouse* v. *More;* and note 4 to section 3 of the Summary Procedure Act, 1864, *infra.*

7 WILL. IV. AND 1 VICT., CAP. 41.

There is one statute which has not been mentioned in its proper chronological order, under which the Sheriff possesses, within certain limits, a power of summary trial in prosecutions for statutory penalties, namely, the Small Debt Act, 1837, 7 Will. IV. and 1 Vict., cap. 41; but as the mode of trial provided by that Act is virtually, if not expressly, superseded by the "further and more "effectual" provisions of the Summary Procedure Act, 1864,[1] a short outline of its procedure will suffice.

It is lawful for any Sheriff within his county to hear, try, and determine, in a summary manner, all prosecutions for statutory penalties that may competently be brought before him, wherein the penalty in question does not exceed the sum of £8, 6s. 8d.,[2] exclusive of expenses and fees of extract; the prosecutor being held to have passed from the remainder of the penalty exigible.[3]

[1] See sec. 27 of the Summary Procedure Act, 1864.
[2] Extended to £12 by 16 and 17 Vict., cap. 80, sec. 26.
[3] 7 Will. IV. and 1 Vict., cap. 41, sec. 2.

The prosecution proceeds on a summons or complaint directed to officers of Court, signed by the Sheriff-clerk, granting warrant to summon the defender to compear on a day not sooner than six free days after citation.[1] The Sheriff hears parties *viva voce*, and examines witnesses, and, if necessary, the parties themselves upon oath. No record of the evidence is directed to be kept, but if specially required, the Sheriff affixes his initials to any document produced, and writes the names of the witnesses examined upon the record copy of the summons.[2]

7 WILL. IV. AND 1 VICT., CAP. 41.

The appropriate form of decree, No. 9 of Schedule (A), ordains instant execution by arrestment, and also execution by poinding and sale, and imprisonment when competent, after ten free days from the date of the decree, if the defender was personally present when decree was pronounced, and if he was not so present, after a charge of ten free days, by serving a copy of the complaint and decree on him personally, or at his dwelling-place.[3]

It is competent to appeal against any decree given by the Sheriff to the next Circuit Court of Justiciary, or, where there are no Circuits, to the High Court of Justiciary, on the following grounds:—Corruption or malice and oppression on the part of the Sheriff, wilful deviations in point of form, which have prevented substantial justice from being done, or incompetency, including defect of jurisdiction. The appeal is only allowed to proceed on consignation of the whole sum and expenses decerned for, and security for the whole expenses of the appeal.[4]

Except as above provided, the Sheriff's decree is not subject to review on any ground whatever.[5]

In conclusion, I must again observe that I have not attempted to deal here with the procedure prescribed by numerous statutes conferring jurisdiction

[1] 7 Will. IV. and 1 Vict., cap 41, sec. 3.
[2] *Ibid.*, secs. 13 and 31.
[3] *Ibid.*, sec. 13.
[4] *Ibid.*, sec. 31.
[5] *Ibid.*, sec. 30.

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on the Sheriff in criminal and quasi-criminal matters; but such explanations as are necessary of the provisions of such statutes will be given in connection with the relative decisions quoted in Part II. of this treatise.

SECTION II.

PROCEDURE IN THE COURTS OF ROYAL AND PARLIAMENTARY BURGHS.

1. *In the Courts of Royal Burghs.*

Erskine, in his Institutes, gives the following account of the criminal jurisdiction of the Magistrates of Royal Burghs in his day:—"In criminal "matters they had anciently the same privilege as "regalities of repledging from the Justiciary or "Sheriff, for which see *Leg. Burg.* c. 61; 1488, c. "1; and they had by special statute (1426, c. 75) "the cognisance of reckless or undesigned fire-"raising; but their criminal jurisdiction hath been "much abridged by our latter usage. They are "still competent to petty riots, but they never had "jurisdiction in bloodwits, unless their grants car-"ried an express right of sheriffship, regality or "barony—*Leg. Burg.*, c. 19, and Skene's Notes; "which special right hath been granted to Edin-"burgh, Stirling, Perth, and some other royal "boroughs. And indeed, when a royal borough is "entitled to any of these, it continues to enjoy a "jurisdiction, not only civil but criminal, as ample "as Sheriffs now have, or as barons or lords of "regality formerly had; for by the Act 20 Geo. II. "all jurisdictions and privileges vested in any "royal borough are reserved in their full extent. "But this jurisdiction is only cumulative with, not "exclusive of, that of the Sheriff, for Sheriffs have "also the cognisance of all questions arising within

"the bounds of the erected lands, except such as "are more closely connected with the public order "or police of the borough; in which, if the Sheriff, "who may possibly be a stranger to its condition, "were allowed to judge, the administration of the "magistrates might be embarrassed, and their "plans for the public interest defeated."[1]

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Since then the exercise of their criminal jurisdiction has been still further abridged, and that of the Sheriff has increased from various causes. In particular, "from the obvious inadequacy in general "of such functionaries to addressing a jury on "criminal matters,"[2] jury trial has for long been discontinued in the Courts of Royal Burghs, and cases calling for that mode of trial are invariably remitted to the Sheriff. And as the trial of serious offences without a jury has been repeatedly discountenanced by the superior Court,[3] the result is, that in practice the criminal jurisdiction of the Magistrates is confined to the preliminary investigation of more serious crimes,[4] and the trial and punishment of inferior crimes and offences; the procedure in the trial of these offences being usually regulated by a general or local Police Act, or by the Summary Procedure Act, 1864. But as the older forms of process are still competent, and are in use, at least in summary cases, a word must be said upon them.

ACT OF ADJOURNAL OF 17TH MARCH 1827.

In Trials by Jury.—The Act of Adjournal of 17th March 1827, which applies indiscriminately to the Courts of the Sheriff and of Royal Burghs,[5] is the ruling authority; procedure in jury trials, as distinguished from trials without a jury in the Burgh Courts, not having been materially affected by subsequent enactments.

[1] Erskine, i. 4, 21, and see Hume, ii. 70.
[2] Alison, ii. 61.
[3] Hume, ii. 150, 151, and the case of *Leonardo Piscatore*, 1770, Maclaurin, No. 100, p. 722.
[4] Hume, ii. 77.
[5] 6 Geo. IV., cap. 23, sec. 7, and preamble of Act of Adjournal.

PROCEDURE IN THE BURGH COURTS.

The two leading amendments in the procedure in jury trials in the Sheriff Court were—(1), The dispensing with taking down the depositions of witnesses in writing, effected by section 17 of 9 Geo. IV., cap. 29; and (2), The introduction of the double diet of compearance by section 35 of 16 and 17 Vict., cap. 80. Neither of these enactments applies to the Burgh Courts, and accordingly if a jury trial were now to take place in one of these Courts, there would be only one diet of compearance, and it would be necessary that the evidence should be reduced to writing.

9 GEO. IV., CAP. 29, AND 11 GEO. IV. AND 1 WILL. IV., CAP. 37.

The general provisions of 9 Geo. IV., cap. 29, and 11 Geo. IV. and 1 Will. IV., cap. 37, as to citation of witnesses, &c., apply to the Burgh Courts where not confined to the Sheriff or other Courts, either expressly or by necessary implication.

In Trials on a Criminal Libel without a Jury.—This mode of trial is also in disuse, but the rules applicable to the Sheriff Court, which have been already explained, apply also to the Courts of Royal Burghs.

In Summary Trials.—Sections 19 and 20 of 9 Geo. IV., cap. 29, apply only to the Sheriff Court, and until the passing of 19 and 20 Vict., cap. 48, in 1856, proceedings following on a summary complaint or summons in the Burgh Courts were conducted according to the former practice, which was by no means uniform.

19 AND 20 VICT., CAP. 48.

The Act of Adjournal of 17th March 1827 contains no provisions on the subject, and the only provision in 9 Geo. IV., cap. 29, which can possibly be held to apply specially to summary trials[1] in the Burgh Courts, is that in section 18, to the effect that *in trials without a jury* no part of the proceedings which is not in use to be taken down in writing in trials by jury need be so taken down, excepting

[1] Sec. 18 of 9 Geo. IV, cap. 29, is generally held to apply only to trials without a jury on a criminal libel; but this limitation is not expressed in the section.

only the depositions of witnesses. Whether this section applies to summary trials or not, the evidence, until 1856, had to be taken down in writing in all trials without a jury, including summary trials.

19 AND 20 VICT., CAP. 48.

By 19 and 20 Vict., cap. 48 (passed in 1856), the form of summary trial regulated by sections 19 and 20 of 9 Geo. IV., cap. 29, was within certain limits extended to the Courts of Royal Burghs and of Justices of the Peace. The Act proceeds on the narrative of the passing of the Acts 9 Geo. IV., cap. 29, and 11 Geo. IV. and 1 Will. IV., cap. 37, and that "it is expedient to facilitate the procedure "in prosecutions for offences before the Magistrates "of Royal Burghs, and before Her Majesty's Jus-"tices of the Peace in Scotland."

Sections 1 and 2 are as follows:—

"1. Where the prosecutor shall in his libel conclude for a fine not exceeding five pounds, exclusive of the costs of the prosecution, which the said Magistrates and Justices are hereby empowered to give, or for imprisonment not exceeding thirty days, accompanied when necessary with caution for good behaviour to keep the peace for a period not exceeding three months, and under a penalty not exceeding ten pounds, it shall be lawful to try such offences without the pleadings or evidence being reduced into writing; provided always that a record shall be preserved of the charge and of the judgment, including the names of the witnesses examined on oath, unless where the accused pleads guilty, which shall be made to appear on such record.

"2. The forms of procedure and regulations applicable to such trials shall be those which are established by the said recited Acts in regard to the summary trial of offences before the Sheriffs of counties; and the note of the evidence to be taken on such trials shall be made by the Clerk of Court, and shall be initialed at the end of each witnesses' evidence by the presiding Magistrate or Justice."

These provisions, it will be seen, differ from those in sections 19 and 20 of 9 Geo. IV., cap. 29, in two respects—*First,* The limit of jurisdiction, viz. the punishment concluded for, is restricted by one-half; *Secondly,* The note of evidence is directed to be made by the Clerk of Court, not by the Magistrate or Justice, and the evidence of each witness to be

19 AND 20 VICT., CAP. 48.

authenticated by the initials of the presiding Magistrate or Justice.

By section 3 the provisions of the Acts 14 and 15 Vict., cap. 27,[1] and 17 and 18 Vict., cap. 86,[2] are extended to sentences pronounced under the Act.

It is provided, however, by section 5 that nothing in the Act shall be held to supersede the provisions of any local Act regulating the procedure before Magistrates or Justices of the Peace in any burgh or county.

For the procedure under the summary form of trial thus authorised, see *supra*, p. 32, *et seq.*, and notes to Schedule (A) of the Summary Procedure Act, 1864.

2. *In the Courts of Parliamentary Burghs.*

3 AND 4 WILL. IV., CAP. 77.

By section 20 of 3 and 4 Will. IV., cap., 77, the rights, powers and jurisdiction of any Royal Burgh is conferred upon Parliamentary Burghs, it being enacted—

"That the Magistrates and Town Council to be elected for the said burghs or towns[3] under the authority of this Act, shall have such and the like rights, powers, authorities and jurisdiction as is or are possessed by the Magistrates and Council of any Royal Burgh in Scotland, and such rights, powers, authorities and jurisdiction shall extend equally over all and every part of the limits of such burghs or towns as described in the said recited Act of the second and third years of the reign of His present Majesty; provided always that the Magistrates and Council of such burghs or towns shall not have the power of trying for crimes punishable by death or transportation; and that the rights, powers, authorities, and jurisdiction hereby conferred shall in no case be exclusive of the authority and jurisdiction of any Admiralty Court or Dean of Guild Court now lawfully established, or of the Sheriff or Justices of the Peace of the county over the territory within the boundaries of said burghs or towns respectively."

It has been doubted, and apparently with good

[1] As to whipping of juvenile offenders, and sentences to hard labour; this Act is repealed by 23 and 24 Vict., cap. 105, sec. 1.

[2] "An Act for the better care and reformation of youthful offenders in "Great Britain;" repealed by 29 and 30 Vict., cap. 117, sec. 37.

[3] Paisley, Greenock, Leith, Kilmarnock, Falkirk, Hamilton, Peterhead, Musselburgh, Airdrie, Port-Glasgow, Cromarty, Portobello and Oban.—See 3 and 4 Will. IV., cap. 77.

reason, whether the Act 19 and 20 Vict., cap. 48, can be held to apply to Parliamentary Burghs. It was passed many years after 3 and 4 Will. IV., cap. 77, and yet it is confined expressly to the Courts of Royal Burghs and of Justices of the Peace. This was probably an oversight, but it has not been corrected. The question, however, is not of much practical importance, as the Parliamentary Burghs either have adopted or may adopt one of the General Police Acts; which, if they do not by implication confer right to use the procedure regulated by 19 and 20 Vict., cap. 48,[1] and 9 Geo. IV., cap. 29, authorise procedure at least as summary, and confer jurisdiction (to employ a somewhat loose expression) as extensive for practical purposes, as the procedure and jurisdiction authorised and conferred by the statutes last mentioned.

Does the Act 19 and 20 Vict., cap. 48, apply to Parliamentary Burghs?

SECTION III.

Procedure in the Police Courts under General or Local Police Acts.

1. *Under the General Police Acts.*

The first General Burgh Police Act was 3 and 4 Will. IV., cap. 46 (1833). This Act was superseded by 13 and 14 Vict., cap. 33 (1850), which, again, was amended by 19 and 20 Vict., cap. 103, Part V. (1856), and 23 and 24 Vict., cap. 96 (1860).

General Police Acts.

The three enactments last mentioned were repealed (except in so far as already adopted) and consolidated by 25 and 26 Vict., cap. 101 (The General Police and Improvement (Scotland) Act of 1862).[2]

This Act may be adopted by any Royal or Parlia-

[1] See sec. 408 of 25 and 26 Vict., cap. 101.
[2] 25 and 26 Vict., cap. 101, sec. 1.

25 AND 26 VICT., CAP. 101.

mentary Burgh, any Burgh incorporated by Act of Parliament, any Burgh of Regality and Barony, or any "populous place," the boundaries of which have been fixed under 13 and 14 Vict., cap. 33, or under the Act of 1862 itself.[1]

The following is a short description of the criminal jurisdiction possessed by Magistrates or Commissioners of Police acting under the authority of this statute, and the procedure prescribed by it:—

Part VI., Section VI., containing clauses 408-438, both inclusive, deals with "jurisdiction and re-"covery of penalties."

Jurisdiction.—Section 408 is as follows:—

"The Magistrates of Police of a burgh under this Act, or any one or more of such Magistrates, shall have jurisdiction and power to take cognizance of all crimes, offences, misdemeanours and breaches of the police regulations hereinbefore contained, or of any bye-law made in virtue of the police provisions of this Act, and of any other crime or offence which is punishable by public general statute or common law, and is within the jurisdiction of the Magistrates of any Royal Burgh, and shall have all such and the like jurisdiction within such burgh as any Magistrate of a Royal Burgh, or any Dean of Guild of a Royal Burgh, has by the law of Scotland within the Royal Burgh in or for which he acts as such Magistrate or Dean of Guild."[2]

Certain serious crimes and offences cannot competently be tried in the Police Court,—*inter alia*, the four pleas of the Crown; the crimes of theft, reset of theft, falsehood, fraud and wilful imposition, and breach of trust and embezzlement, when the money or article stolen, resetted, obtained or embezzled exceeds in value the sum of £10; assault to the danger of life, and other aggravated assaults, &c. &c. If it appears during the preliminary investigation or during trial that a charge of one of the crimes enumerated is involved, the Magistrate commits the accused to prison for examination, and notice is given to the Procurator-Fiscal of the county in which the offence is charged to have been

[1] 25 and 26 Vict., cap. 101, secs. 3 and 15.
[2] As to the powers of the Dean of Guild see Erskine, i. iv. 24.

committed, in order that the accused may be proceeded against conformably to law.[1] 25 AND 26 VICT., CAP. 101.

The jurisdiction of the Sheriff and Court of Guild is reserved by section 438:—

"No jurisdiction conferred by this Act shall be held to exclude the jurisdiction of any Sheriff or Court of Guild, where the case shall, in the first instance, have been brought before or taken up by such Sheriff or Court of Guild."

Citation and Apprehension of Accused, and Citation of Witnesses.—Whether citation of the accused is necessary depends on the nature of the offence charged.[2]

The Act is sufficient authority to constables for citing the accused and witnesses. The citation must state the nature of the charge, and time and place of appearance.[3]

Warrants for the apprehension or citation of accused persons, or for the citation of witnesses for the prosecutor or for the accused, where such witnesses are beyond the jurisdiction of the Magistrates of Police, are sufficient, within Scotland, for such apprehension and citation, and for conveying offenders to be dealt with according to law, if backed or indorsed by the Sheriff or any Justice of the Peace of the county within which the same are executed; provided they are executed by a constable acting under the authority of the police provisions of the Act.[4]

Very wide powers of arrest are given by Section 117. The Superintendent of Police or any constable of police may, without any other warrant than the Act, apprehend any person found within the burgh committing any criminal, riotous, or disorderly conduct or act, or accused or suspected of having committed any crime or offence, whether competent to be tried by the Magistrates of Police

[1] Sec. 413.
[2] *Graham* v. *Linton*, H. C., Nov. 24, 1856, 2 Irv., 558.
[3] Sec. 419. [4] Sec. 420.

25 AND 26 VICT., CAP. 101.

or not, or committed within or beyond the bounds of the burgh.[1]

Procedure on Apprehension.—Every person taken into or detained in custody by virtue of the Act may be detained in the police office or police cells, and shall be taken before the Magistrate not later than in the course of the first lawful day after he shall be taken into custody.

"And if the nature of the crime or offence charged shall admit of its being competently tried before the Magistrate under the provisions of this Act, it shall be lawful for him to grant warrant to commit such offender to the police cells, or to prison when remanded, for affording time to find bail or for further examination or trial, such further examination or trial always taking place as soon as circumstances shall permit, and without any unnecessary delay; or if the crime or offence charged shall, in the opinion of the Magistrate, merit a higher or greater punishment than he can lawfully award, it shall be lawful for him at any stage of the examination or trial to commit such offender to prison for examination; or if the crime or offence charged, from having been committed beyond the limits of the burgh, or from being otherwise excluded from the jurisdiction of the Magistrate, falls to be tried in another jurisdiction, it shall be lawful for the Magistrate to commit such offender to prison until disposed of according to law; in either of which last two cases it shall be the duty of the Superintendent of Police to give notice of such commitment to the Procurator-Fiscal or other proper officer for the city, county, burgh, or other jurisdiction within which the crime or offence was committed, in order that such offender may be further proceeded with according to law."[2]

Liberation on Bail or Deposit.—Upon the apprehension of any person charged with any offence under the Act, or with any crime which may be competently tried before the Magistrate, the Superintendent of Police, or other officer having charge in his absence, may liberate the accused on his finding bail, or making a deposit to an amount not exceeding £20, as a guarantee for his attendance at all after diets of Court; but if the superintendent or other officer sees cause, he may refuse to accept

[1] Sec. 117. [2] Sec. 418.

such bail or deposit, and is not liable to any claim for damages in respect of such refusal.[1] 25 AND 26 VICT., CAP. 101.

Forms of Procedure in the Police Court.

The Instance.—All actions, prosecutions, and proceedings for crimes and offences committed within the burgh (including all crimes and offences at common law, or under public general statute not excluded by section 413), or for recovery of fines, &c., under the police provisions of the Act (the mode of recovering which is not otherwise provided for), shall be sued in the Police Court before the Magistrates of Police at the instance of the Procurator-Fiscal appointed[2] by the Magistrates for the purposes of the Act.[3]

The Complaint.—No form of complaint is given, but there should be a complaint[4] written or printed, or partly both, and signed by the prosecutor, although it is not always necessary that it should be served, or even that it should be written out before the trial begins. Compare *Bisset* v. *Mackay*, H. C., March 3, 1855, 2 Irv. 68, and *Cogan or Devany* v. *Anderson*, H. C., Dec. 16, 1854, 1 Irv. 588. Where the charge is one of theft, reset of theft, falsehood, fraud, and wilful imposition or breach of trust and embezzlement, the complaint must bear that the articles stolen, resetted, obtained by falsehood, fraud, and wilful imposition or embezzlement does not exceed £10.[5]

It is not competent to any party who shall appear to answer to any complaint to plead want of due citation or informality in the warrant, citation, or execution.

If the accused wishes to prove that the value of the money or article which he is charged with

[1] Sec. 417. [2] Secs. 409, 410. [3] Sec. 411.

[4] This is plain from the terms of Sec. 411.

[5] Sec. 411. Where two or more charges of theft or reset are tried under one complaint, it must appear on the face of the complaint that the value of the whole articles is under £10.—*Law* v. *Munro*, H. C., March 6, 1855, 37 Sc. Jur. 355.

25 AND 26 VICT., CAP. 101.

having stolen, resetted, obtained or embezzled, exceeds £10, he must offer to do so at the time,—that is, at the hearing.[1]

The whole procedure before the Magistrates is conducted summarily *viva voce*, and without written pleadings; and no record need be kept except the complaint and the judgment pronounced thereupon.[2]

Sections 423 and 424 provide for the imposition of penalties and punishments on witnesses refusing to give evidence or prevaricating.

Where it is necessary to adjourn the diet, and the accused's witnesses are in attendance, the Magistrate may, if he deems it proper, at the request of the accused, take the evidence of the said witnesses before the proof for the prosecution has been led or concluded; but in such cases the accused shall be entitled to lead additional evidence after the prosecutor's case has been concluded.[3]

The Magistrates of Police are authorised and required, with the approbation and advice of the Lord Justice-General and Lord Justice-Clerk, when necessary, to frame rules and regulations and forms of procedure, and to alter and amend the same from time to time.[4]

Limitation of Sentences of Imprisonment for Non-Payment of Penalties, &c.—No period of imprisonment for non-payment of pecuniary penalties shall exceed sixty days; but when the accused is ordained to find caution for good behaviour from and after the expiry of his sentence of imprisonment, or payment of the fine or penalty, and fails to do so, he may be detained in prison until caution is found, provided the whole period of imprisonment does not exceed ninety days.[5]

[1] Sec. 411. [2] *Ibid.* [3] Sec. 421.

[4] Sec. 412. When rules and regulations are so framed, they have the force of statutory enactments and must be closely followed.—*Mahon* v. *Morton*, H. C., Feb. 6, 1856, 2 Irv. 383; *Lone* v. *Buchan*, H. C., June 9, 1867, 5 Irv. 423; and *Cogan* or *Devany* v. *Anderson*, *supra*.

[5] Secs. 425, 426, 427. By sec. 29 of the Summary Procedure Act it is provided that sentences of Police Judges acting under statutes in which their powers are not defined shall not exceed (*a*) a penalty of £5, or (*b*) im-

Limitation of Prosecutions.—Prosecutions, &c. under the provisions of the Act must be commenced within three months from the time at which the facts on which they were brought shall have been discovered or known, and not thereafter.[1] 25 AND 26 VICT., CAP. 101.

Review.—"No order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted before the Magistrate by virtue of this Act, shall be quashed or vacated for any misnomer or informality; and all judgments and sentences pronounced by the Magistrate shall be final and conclusive, and not subject to suspension or advocation or appeal, or any other form of review, or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the Magistrate, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the Magistrate; and such suspension, or advocation or appeal, or review or stay of execution, must be presented before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions, which shall from time to time be prescribed by the said High Court of Justiciary."[2]

And by section 437 it is provided that

"Wherever any act, decision, determination, declaration, or de-
" liverance of any Sheriff or Magistrate, or Preses of a meeting,
" Commissioner or Commissioners, or other person whatever, is by
" this Act declared to be final, the same shall not be subject to be
" set aside or reviewed or affected by any Court or Judicature,
" upon any ground or in any manner of way whatever."

The meaning and effect of these and similar clauses are fully considered in Part II. hereof.

2. *Procedure under Local Police Acts.*

Many of the large towns have Local Police Acts framed on the model of the General Police Act,

prisonment for sixty days, and (c) caution to keep the peace for six months under a further penalty of £10, and, in default of caution, further imprisonment for thirty days.

[1] Sec. 416. [2] Sec. 430.

LOCAL POLICE ACTS.

and varying considerably in the extent of the jurisdiction conferred, and the nature of the procedure prescribed. It is impossible here to attempt to give any account of these Acts. Other difficulties apart, their provisions are in many instances complicated by piecemeal amendments and additions effected by subsequent local Acts, by rules and regulations framed by the Magistrates or Commissioners, or by the total or partial adoption of one of the General Police Acts, which by statute has the effect *pro tanto* of repealing the local Acts or regulations previously in force.[1] To take as an instance the case of Edinburgh, the existing local police enactments and regulations are derived from at least five different sources:—

1. The Edinburgh Police Act, 1848, 11 and 12 Vict., cap. CXIII.
2. The Municipality Extension Act, 1856, 19 and 20 Vict., cap. XXXII.
3. Edinburgh Police Amendment Act, 1854, 17 and 18 Vict., cap CXVIII.
4. Edinburgh Provisional Order, 1867, confirmed by 30 and 31 Vict., cap. 58.
5. Various clauses adopted from the General Police Act, 25 and 26 Vict., cap. 101.

Under section 80 of the Edinburgh Police Act of 1848, and section 53 of the Edinburgh Municipality Extension Act, 1856, the Sheriff sits in his turn as Judge in the Police Court.

The last Glasgow Police Act is 25 and 26 Vict., cap. CCIV. (1866).

In Part II. of this treatise instances will be found of questions which have arisen under some of these Local Police Acts; such of their provisions as are necessary for explanation are there quoted or described.

[1] 25 and 26 Vict., cap. 101, sec. 18.

SECTION IV.

Procedure before Justices of the Peace.

Before the passing of the Summary Procedure Act, procedure in these Courts, in prosecutions for offences or recovery of penalties, was regulated as follows :—

1. In prosecutions at common law, or under statutes which authorised prosecutions or suits for penalties, but did not prescribe any particular procedure, the forms directed by 9 Geo. IV., cap. 29, sections 19 and 20, and made applicable by 19 and 20 Vict., cap. 48, were used from and after the year 1856.[1] Before that time the evidence had to be reduced to writing in every case, unless this was dispensed with by the special statute. 19 and 20 Vict., cap. 48.

2. Where the statute conferring jurisdiction, and authorising the prosecution or suit, prescribed forms of procedure, such forms had to be followed implicitly, under pain of the proceedings being quashed, on account of deviations from the statutory forms.

The Summary Procedure Act virtually supersedes the procedure directed by special statutes (although they may still be used), and in this respect has proved of greater benefit to the Justice of Peace Courts than to any other inferior Court. A great part of the criminal jurisdiction of the Justices is derived from special statutes ; for instance— Special Statutes.

The Pawnbrokers Act, 39 and 40 Geo. III., cap. 39 ;

The Combination Act, 6 Geo. IV., cap. 129 ;

The Night Poaching Act, 9 Geo. IV., cap. 69 ;

The Day Trespass Act, 2 and 3 Will. IV., cap. 68 ;

The General Turnpike Act, 1 and 2 Will. IV., cap. 43 ;

[1] See *supra*, p. 39.

SPECIAL STATUTES.

The Public Houses Acts, 9 Geo. IV., cap. 58; 16 and 17 Vict., cap. 67; and 25 and 26 Vict., cap. 35;

The Weights and Measures Acts;

The Master and Servant Acts, 4 Geo. IV., cap. 34 (1823); and 30 and 31 Vict., cap. 141 (1867); and many others.

Some of these statutes give directions as to procedure, and some do not. Many of those which do so are statutes of the United Kingdom; and the forms provided are in many cases adapted from English forms, and with no regard to Scotch criminal procedure.[1]

The Summary Procedure Act provides[2] that "the "proceedings in any action or complaint for the "prosecution for offences or recovery of penalties "under any Act of Parliament, may either be "according to the form prescribed by such Act, or "any Act incorporated therewith, or according to "form prescribed by this Act."

The Summary Procedure Act does not apply to proceedings under the Poor Law Act, or under the Revenue Statutes.[3]

[1] See *Byrnes &c.* v. *Dick*, H. C., Feb. 23, 1853, 1 Irv. 145, per Lord Justice-Clerk, p. 158; and *Knox* v. *Ramsay*, H. C., July 7, 1837, 1 Swin. 517.

[2] Sec. 32.

[3] Sec. 25.

CHAPTER II.

SECTION I.

The Passing of the Summary Procedure Act, 1864.

In the year 1848 there was passed an English Statute, 11 and 12 Vict., cap. 43, intituled "An "Act to facilitate the performance of the duties of "Justices of the Peace out of Sessions within "England and Wales with respect to Summary "Convictions and Orders;" which, in 1857, was supplemented by another English Statute, 20 and 21 Vict., cap. 43, intituled "An Act to improve "the administration of the law so far as respects "Summary Proceedings before Justices of the "Peace." By the latter statute Justices were required, on the application of the party aggrieved by the determination of the Justice in point of law, to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of one of the superior Courts of law, to be named by the party.

The Scotch Summary Procedure Bill of 1864 was adapted from the former Statute, 11 and 12 Vict., cap. 43, but when first introduced did not contain any provisions for review similar to those in 20 and 21 Vict., cap. 43. During the course of the Bill through the House of Commons this omission was discovered, and certain appeal clauses were inserted, being sections 31 to 43, both inclusive, of the Bill as it left the House of Commons.

On the narrative that it was expedient that provision should be made for obtaining the opinion of a superior Court on questions of law arising in the

exercise of summary jurisdiction by appeal, it was declared that the Court of appeal for cases of a criminal nature should be the Court of Justiciary, at its ordinary sittings in Edinburgh or on Circuit; for other (*i.e.* civil) cases, the Court of Session, in either Division thereof.[1]

Either party being dissatisfied with the judgment of any Sheriff, Justices or Justice, or Magistrate, on the ground of the determination complained of being erroneous in point of law, might apply to the said Judge to state and sign a case setting forth the facts and the grounds of such determination, for the opinion of the Court of appeal having jurisdiction.[2] Then followed detailed directions as to the framing of the case, fees to be paid to the Clerk of Court, and the transmission of the case to one of the Clerks of Justiciary, or of the Division of the Inner House to which the appeal was taken, with a Certificate of Intimation of the appeal to the opposite party.

All appeals to the Court of Justiciary were to be disposed of by the High Court at its ordinary sittings in Edinburgh, unless the same were marked to the Circuit.[3] The case, when received by the Clerk of the superior Court, was forthwith to be laid before a Judge of the Court of Justiciary, or of the Court of Session, according as the case was civil or criminal, who, if the appellant was in custody, was empowered to grant interim liberation, upon the conditions usual in cases of suspension and liberation, and also to grant a sist of execution, with or without caution, or make such other interim order as justice might require.[4]

The provisions for the hearing of the case, the application of the judgment of the Court of appeal, and the ordering a case to be stated when the inferior Judge refused to do so,[5] were substantially the same as those contained in the

[1] Sec. 31. [2] Sec. 32. [3] Sec. 33. [4] Sec. 34.
[5] Secs. 36, 37, and 35, 38.

Summary Prosecutions Appeals (Scotland) Act of 1875.

Sections 39, 40, and 41 were as follows:—

"39. Where, by any Act of Parliament now in "force, Jurisdiction is given to any Court or Judge "for the trial of any offence, or the determination "of any matter which may be tried or determined "by complaint under this Act, and where, by such "Act or any relative Act, the Jurisdiction of the "Court of Justiciary or the Court of Session, as "Courts of review, is excluded or restricted, such "exclusion or restriction of review shall, subject to "the following exception, be deemed and taken to "apply to review by appeal under this Act, as well "as to review by Advocation, Suspension or Re- "duction; and the provisions of the fourth recited "Act excluding the review of the superior Courts "shall be applicable to judgments under this Act, "for penalties not exceeding eight pounds, six "shillings and eight pence, which shall not have "been followed by Imprisonment; provided that, "notwithstanding any such exclusion or restriction "of review, it shall be lawful for such Court or "Judge, *ex proprio motu*, to state a case for the "opinion of the Court of appeal under this Act, "upon any question of difficulty or importance "arising on the construction of the Act under "which the proceedings are taken, and to direct "that the expenses of the Procurator-Fiscal, or "any other public prosecutor appearing to support "the judgment in the Court of appeal, shall be "paid out of the rogue-money of the country.

7 Will. IV., and 1 Vict., cap. 41.

"40. It shall not be lawful for the Court of "Justiciary or for the Court of Session to receive "any Bill or Note of Suspension or Advocation, "or any Summons of Reduction of any judgment "or determination pronounced upon a complaint "instituted under the provisions of this Act, either "on the ground of defect of jurisdiction or on any

"other ground whatsoever; but it shall be lawful "for the Court of appeal under this Act to grant "relief against the judgment or determination of "any Sheriff, Justices or Justice, or Magistrate, "assuming to exercise jurisdiction in relation to "such complaint upon a case stated and signed "by such Sheriff, Justices or Justice, or Magistrate.

"41. Where, under the provisions of any Act of "Parliament now in force, any judgment or deter-"mination upon a complaint under the provisions "of this Act might be appealed by presenting a "Note of Appeal to the High Court of Justiciary at "Edinburgh, or to the Circuit Court of Justiciary, "or to Justices of the Peace in Quarter Sessions, "such appeal shall no longer be competent, but in "lieu thereof it shall be lawful to bring such judg-"ment or determination under the review of the "Court of appeal under this Act upon a case "stated and signed as aforesaid."

These provisions were important. While, in proceedings under the Summary Procedure Act, appeal was declared not to be competent where review was excluded or restricted by the special statute giving jurisdiction for the prosecution or trial, the Court or Judge was given the important power of stating a case for the opinion of the Court of appeal *proprio motu* on any question of difficulty or importance arising on the construction of the special statute.

Further, the mode of appeal provided was intended, in regard to complaints brought under the Act, to supersede entirely the existing modes of review at common law on any ground whatever, including the ground of defect of jurisdiction; and also to abolish the right of appeal under the provisions of any Act of Parliament to the High Court of Justiciary at Edinburgh, or to the Circuit Court of Justiciary, or to the Justices of the Peace in Quarter Sessions; the new mode of Appeal by a case stated

and signed being substituted therefor, and an alleged defect of jurisdiction being one of the grounds on which such a case might be demanded.

These clauses, it will be seen, provided a comprehensive and uniform mode of obtaining review in all summary cases brought under the Act. In effect they placed it in the power of the complainer, by bringing his complaint under the Act, to exclude review by the Justices in Quarter Sessions, and to limit review by the Court of appeal to questions of *law* or defect of jurisdiction. On the other hand, the accused, if convicted, had the power of giving a good deal of trouble to the inferior Judge and his clerk, and also to the complainer, "objections "in law" being not easily defined or restricted. Accordingly, considerable opposition was created among the parties likely to be affected. It is not here necessary to inquire into the causes which led to this opposition. It may be that it was thought that a good deal of additional labour would be thrown upon the Justices and their clerks in the preparation of the cases, and that the amount of the remuneration proposed was inadequate. But the main objections stated were, that it was proposed to take away the power of review conferred on the Justices in Quarter Sessions by many important statutes, for the administration of which they formed the best tribunal, and possessed the confidence of the country; that the superior Courts were already too strict in quashing convictions, and were inclined to magnify every trifling defect in form into a defect in law; that a right of appeal so broad and so imperfectly guarded as that proposed would open the door for the escape of criminals; that it would either lead to the prosecutor not appearing on account of expense, or burden him with expenses which he could never recover; and lastly, that if the inferior Judge refused to state a case, he would be forced to assume the position of a litigant, and might even be found liable in expenses.

The opposition was successful. It was seen that, if the appeal clauses were retained, the Bill could not pass the second reading in the House of Lords. They were accordingly struck out, and the Act was passed in its present shape.

The Act, as passed, effected many valuable improvements in the summary procedure of inferior Courts, but, in consequence of the appeal clauses and other provisions depending on them having been struck out, it was open to one serious objection. The 17th section of the Bill, as it left the House of Commons, was amended in the House of Lords, and now forms section 16 of the Act. These sections are as follows :—

The 17th Section of the Bill.

"It shall not be necessary in "any proceeding under the "authority of this Act to record "or to preserve a note of the "evidence adduced, but the re-"cord shall set forth, in the "form of the Schedule (I) to "this Act annexed, the respon-"dent's plea, if any, the names "of the witnesses, if any, ex-"amined upon oath or affirma-"tion, with a note of any docu-"mentary evidence that may be "put in, and the conviction or "judgment; and the Judge shall "also, if required, take a note "of any offer of proof made by "either of the parties and re-"fused to be admitted, any "objection to the admissibility "of evidence sustained or re-"pelled, and any objection to "the relevancy or competency "of the charge or proceedings "to which he may not have "thought proper to give effect "by amendment of the com-"plaint in manner herein before "provided; and the Judge may

The 16th Section of the Act.

"It shall not be necessary "in any proceeding under the "authority of this Act to record "or to preserve a note of the "evidence adduced, but the re-"cord shall set forth, in the "form of the Schedule (I) to "this Act annexed, the respon-"dent's plea, if any, the names "of the witnesses, if any, ex-"amined upon oath or affirma-"tion, with a note of any docu-"mentary evidence that may be "put in."

"require from the party or his
"agent a suggestion in writing
"of the matter which he desires
"to have set forth in such note,
"but shall not be bound to set
"forth the same in the words
"suggested, and shall not be
"bound to note any objection
"which, in the opinion of the
"Court, is merely frivolous."

The first part of the original section, it will be seen, still remains. It confers a very important power upon inferior Judges which they did not before possess.

Under sections 19 and 20 of the Act 9 Geo. IV., cap. 29, the Sheriff is required, in proper summary cases, to preserve a note of the evidence taken by him, for the purpose of exhibition, if called for by the Court of Justiciary; and further, it is imperative that the record shall set forth, if either party desire it, any offer of proof made by either of the parties and refused to be admitted, and likewise, if so desired, any objections to the admissibility of evidence sustained or repelled by the Court; and by 19 and 20 Vict., cap. 48, this procedure is made applicable to such summary cases tried before Magistrates of Royal Boroughs and Justices of the Peace. These provisions afford means of review by the superior Court on the merits, and upon questions as to the admission or rejection of evidence. Now, section 17 of the Bill, as it left the House of Commons, on the one hand virtually excluded the power of review on the merits by making it no longer necessary for the Judge to take a note of the evidence. On the other hand, it provided facilities for the exercise of the right of appeal on questions of law by re-enacting the provisions above mentioned, requiring the Judge to take a note of any offer of proof refused or objection to evidence sustained or repelled,[1] and also by requiring

[1] Namely those in 9 Geo. IV., cap. 29, sec. 19.

the Judge to note objections to the relevancy or competency of the charge or proceedings to which he might not have thought proper to give effect by amendment of the complaint; and the appeal clauses provided a complete remedy against any error in point of law, or any defect of jurisdiction on the part of the inferior Judge.

But the result of the alterations on the Bill in the House of Lords was, that the determination of the inferior Judge was virtually made final on the merits in many cases; while even the previously existing statutory provisions for noting an offer of proof or objections to evidence were made no longer imperative in proceedings under the Act. On the other hand, the liability to review on the law, which was intended to have acted as a counterpoise to finality on the merits, was removed by striking out the appeal clauses.

The Act at first created some alarm in the minds of many experienced judges and lawyers, and in the earlier cases which occurred under it there are to be found some strong expressions from the Bench as to the danger of dispensing with a note of the evidence, and of objections to the admission or rejection of evidence.

It appears to me that these apprehensions have not been borne out by the working of the Act during the last ten years. I believe that, on the whole, it has worked well, and certainly there have been comparatively few cases of miscarriage in consequence of its provisions. This, it may be said, shows that the experiment of making the determination of the inferior Judge in summary causes final on the facts has been successful, and may safely be continued. It may be so, but it must be borne in mind that in cases under the Act we have sometimes had to thank the natural vigour of the common law power of review possessed by our superior Courts, for correction of and redress against mistakes in law, or in essential parts of procedure. Objections in

point of law, or in respect of material irregularities in procedure, have been scrutinized even more strictly than before, because review on the merits was excluded. But owing to the absence of any ready means of verifying such objections,—there being no record of what took place in the inferior Court,—great inconvenience and expense have been caused to the parties. Before allowing a proof of alleged irregular or oppressive procedure, the superior Court most properly requires averments both specific and relevant. Often the practical difficulty of proving the objection, however relevant it may be, is deemed insurmountable, and no proof is allowed, in cases in which a note of the objection on the record, made and authenticated at the time, would have removed all difficulty. Again, hardships quite as great are inflicted on respondents in cases in which an investigation or proof takes place; the complainer, in order to obtain a proof, makes his averments relevant enough, but after a long and expensive proof has been taken, and unnecessary and irrecoverable expense been incurred by the opposite party, the complainer's statements are ascertained to be unfounded.

The recommendations of the recent Scotch Law Commission on the subject are as follows:[1]—

"Cases tried summarily by the Sheriff without "a jury are in most sheriffdoms tried under the "forms in use prior to the passing of the Summary "Procedure Act of 1864. These forms require a "note of the evidence and of all objections thereto "to be kept. There are thus means of disposing "of any appeals which may be brought. This "form, though not now imperatively required in "summary cases, is, we believe, still generally "adopted in the Sheriff Courts, even in the less "serious of that class of cases; but in some Sheriff

[1] 5th Report (1871), p. 16.

"Courts, and almost universally in the Justice of "Peace Courts, it is usual to adopt the provisions "of the Summary Procedure (Scotland) Act, 1864. "That Act provides that no note of the evidence "need be kept. There is no provision that parties "may call upon the Judge to make a note of it, or "of objections. There is no provision for review, "and there are no materials for review, either on "the evidence or on the law. The result of this "state of matters is, that while the ordinary criminal "proceedings of the Sheriff Court, where a paid "and professionally trained magistracy presides, are "subject to review, the provisions of the Summary "Procedure Act have practically made the pro-"ceedings of the unpaid and unskilled magistracy "final and exempt from review in a large and "important part of their jurisdiction, as with regard "to questions between master and servant, and "with regard to the Public House Acts, &c.

27 and 28 Vict., cap. 53.

"We recommend that in all cases it should be "imperative on the Judge to keep a note of the "evidence, and of objections and answers, if re-"quired by either party to do so; also that pro-"vision should be made for having a case stated "for the opinion of the Court of review, similar "in principle to the provisions for review in the "English Summary Procedure Act. The mode of "obtaining review by stating a case has long "existed, and we believe has worked well under the "Revenue, Assessed Taxes, and Valuation Acts; "and we have no reason to doubt that it would "work well also under the Summary Procedure "Act."

These recommendations have to a certain extent been given effect to by the Summary Prosecutions Appeals (Scotland) Act, 1875, which is dealt with hereafter.

It is sufficient to mention here that in that statute provision is made for stating a case on points of law

for the opinion of the High Court of Justiciary or either Division of the Court of Session, according as the jurisdiction in the cause is of a criminal or a civil nature, "notwithstanding any provision contained "in the Act under which such cause shall have "been brought excluding appeals against or re-"view in any manner of way of any determination, "judgment, or conviction or complaint under such "Act."—(section 3). By the interpretation clause (section 2) the word "cause" is declared to mean and include "every proceeding which may be "brought under the Summary Procedure Act, 1864, "and every other summary proceeding for the pro-"secution of an offence or recovery of a penalty "competent to be taken before an inferior Judge."

It also contains the following provision, which materially qualifies section 16 of the Summary Procedure Act, 1864, that "In order to an "appeal under this Act it shall be competent "for any party to a cause to require the Sheriff, or "Sheriff-substitute where the cause depends before "him, or the Clerk of the Court where the cause "depends before any other inferior Judge, to take "and preserve a note of any objections to the "admissibility of evidence sustained or repelled by "such Sheriff, Sheriff-substitute, or other inferior "Judge."[1]

SECTION II.

THE SUMMARY PROCEDURE ACT, 1864.

It has been thought advisable to give the Act itself with notes, instead of a synopsis; but the following points may be noted by way of introduction:—

1. The Act, as appears from its title, was passed

[1] Sec. 6.

to make provision for uniformity of process in summary criminal prosecutions and prosecutions for penalties in the inferior Courts in Scotland. The word "Court" is defined to mean "any Sheriff "Court or Burgh Court, or any Court of Justices "of the Peace for any county or city in Scotland, "whether in Quarter or Petty Sessions, any Police "Court having jurisdiction, or any Sheriff, Magis-"trate of any burgh, or Justice or Justices of the "Peace for any county or city in Scotland, exer-"cising jurisdiction under the authority of any "Act of Parliament in any matter which may "lawfully be brought before him or them in the "manner provided by this Act." The procedure is very much the same as that provided by Sir William Rae's Act. The importance of the measure lies in that procedure being made applicable to the many statutes authorising prosecutions for offences and the recovery of penalties, which either contain no specific directions as to procedure, or enjoin procedure adapted to the English and not to the Scotch forms of process.—See the cases of *Knox* v. *Ramsay*, H. C., July 7, 1837, 1 Swin. 517; and *Byrnes and Others* v. *Dick*, H. C., Feb. 23, 1853, 1 Irv. 145.

2. Again, in many statutes affecting the public interest no prosecutor is specially named, and accordingly offences committed and penalties incurred were often not prosecuted or sued for. To remedy this the Act provides that where no special provision is made for the recovery of penalties, they may be sued for by the Procurator-Fiscal of the jurisdiction (section 4); and in order to encourage the Procurator-Fiscal to discharge these duties, it is provided that no Procurator-Fiscal, or other party prosecuting for the public interest, shall be liable in damages in a greater sum than £5, unless malice and want of probable cause is averred and proved (section 30).

3. The Act is permissive, with certain excep-

tions mentioned in sections 27[1] and 31; it is still competent to use the procedure authorised by the first three Acts recited in the preamble, or by special statutes authorising prosecutions (sections 3 and 32).

4. The leading feature of the Act is, that it regulates procedure. It does not confer upon the inferior Judge any other or more extensive jurisdiction than that which he possessed before, in relation to any matter which may be made the subject of complaint (section 27); and it does not supersede, enlarge, or limit the provisions for review contained in special statutes. Accordingly, where there is room for doubt, it is to be construed in the sense which is most consistent with leaving the law as it previously stood untouched.

5. From this it follows that no case can be tried summarily under the Act which could not be tried summarily before; and that where a right of appeal is given by special statute, this Act does not take such right away.

6. Section 16, as we have seen, enacts that it shall not be necessary in proceedings under the Act for the Judge to preserve a note of the evidence adduced. This applies to all prosecutions at common law, or under statutes which contain no special provisions for review. The common law obligation to preserve a note of the evidence adduced is thus abolished in such cases, and review on the merits excluded.

7. The 28th section defines the limits of civil and criminal jurisdiction, as to which great uncertainty prevailed. Questions frequently arose whether the offence charged was *malum in se* or *malum prohibitum;* and if the latter, whether the case was rendered criminal *quoad* review by the procedure enjoined by the statute. This led to many cases, which were brought by suspension or appeal before the Court of

[1] The wording of this section is not very distinct; but it seems to declare that the forms provided by the Small Debt Act, 1837, in prosecutions for pecuniary penalties, are superseded by the Summary Procedure Act.

Session and Court of Justiciary respectively, being dismissed on the ground that they had been brought to the wrong Court. The test prescribed by section 28 is the sentence which may competently be pronounced. It declares that those proceedings shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or in default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and that in all other proceedings the jurisdiction shall be held to be civil. This definition is solely for the purpose of fixing the Court of review; and it renders the summary procedure of the Court of Justiciary applicable to many cases which formerly had to be taken to the Court of Session, and run the more prolonged course of a civil process.

THE SUMMARY PROCEDURE (SCOTLAND) ACT, 1864.

27 & 28 VICTORIA, CAP. 53.

An Act to make Provision for Uniformity of Process in summary Criminal Prosecutions and Prosecutions for Penalties in the inferior Courts in Scotland.—[25th July 1864.]

WHEREAS by an Act passed in the Ninth Year of the Reign of King *George* the Fourth, intituled *An*

Act to authorise additional Circuit Courts of Justiciary to be held, and to facilitate Criminal Trials, in Scotland, Provision was made for the summary Prosecution of Offences before Sheriffs of Counties in certain Cases; which Act was amended by an Act passed in the Eleventh Year of the Reign of King *George* the Fourth and the First Year of the Reign of King *William* the Fourth, intituled *An Act to amend an Act of the Ninth Year of His late Majesty King* George *the Fourth, to facilitate Criminal Trials in* Scotland, *and to abridge the Period now required between the pronouncing of Sentence and Execution thereof, in Cases importing a Capital Punishment*: And whereas by an Act passed in the Nineteenth and Twentieth Year of the Reign of Her present Majesty, intituled *An Act for amending the Procedure before Magistrates and Justices of Peace in* Scotland, the Provisions of the recited Acts with respect to summary Prosecutions were in certain Cases made applicable to Prosecutions before Justices of the Peace in *Scotland*: And whereas by an Act passed in the Seventh Year of the Reign of King *William* the Fourth and the First Year of the Reign of Her present Majesty, intituled *An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the Establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs in* Scotland, Provision was made for the Recovery of statutory Penalties by way of Action in the Sheriff Court in certain Cases: And whereas it is expedient to make further and more effectual Provision for the Trial of Offences punishable on summary Conviction, and for the summary Recovery of Penalties in the inferior Courts in *Scotland*: Be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

9 Geo. IV., cap. 29.

11 Geo. IV. and 1 Will. IV., cap. 37.

19 and 20 Vict., cap. 48.

7 Will. IV. and 1 Vict., cap. 41.

Short title.

1. This Act may be cited for all Purposes as "The Summary Procedure Act, 1864."

Interpretation of Terms.

2. The following Words in this Act shall have the Meanings hereby assigned to them, unless such Meanings shall be excluded by the Subject or Context:—

"Act of Parliament" and "Act" shall mean any Public General or Local and Personal Act of Parliament now in force or hereafter to be passed:

"Court" shall mean any Sheriff Court or Burgh Court, or any Court of Justices of the Peace for any County or City in *Scotland*, whether in Quarter or Petty Sessions, any Police Court having Jurisdiction, or any Sheriff, Magistrate of any Burgh, or Justice or Justices of the Peace for any County or City in *Scotland*, exercising Jurisdiction under the Authority of any Act of Parliament, in any Matter which may lawfully be brought before him or them in the Manner provided by this Act:

"Judge" shall mean any Sheriff, or any Magistrate of any Burgh, or any Justice of the Peace, whether acting alone or in conjunction with any other Justice or Justices of the Peace for the same county or City in *Scotland*:

"Magistrate" shall mean any Magistrate of any Burgh in *Scotland* having Jurisdiction:

"Sheriff" shall include Sheriff-Substitute:

"Justice" shall mean any of Her Majesty's Justices of the Peace for any County or City in *Scotland* acting within such County or City:

"Clerk of Court" shall include Depute-Clerk or other Person acting as such:

"Witness" shall include Haver:

"Oath" shall include Affirmation in Cases where Affirmations may lawfully be taken in place of Oaths:

"Penalty" shall mean any Sum of Money which

may, under the Authority of any Act of Parliament, be recoverable from any Person in respect of the Contravention of and statutory Requirement or Prohibition, and also any Sum which may, under the Provisions of any Act of Parliament, be recoverable as a Penalty or Forfeiture, whether such Sum shall be payable to the Party complaining, prosecuting, or suing for the same, or shall be payable in whole or in part to any other Person, or be applicable to any other Use, and whether the Amount thereof is fixed by such statutory Provision, or is so fixed subject to a Power to modify or mitigate, or is in the Nature of a Penalty not exceeding a certain Sum, to be awarded by the Court or Judge who may take cognizance thereof:

"Administrators of Police" shall mean any Commissioners, Town Council, or other Body having the charge or Management of the Police of a Town under the Powers created by any Act of Parliament.

Application of the Act.

3. The Provisions of this Act may[1] be applied to—

(1.) All Proceedings before any Sheriff, Justices or Justice, or Magistrate in *Scotland*, in virtue of the summary[2] Jurisdiction conferred[3] upon them, or any of them, in relation to the Trial of Offences and Recovery of Penalties, by the recited Acts, or any of them:[4]

(2.) All[5] Proceedings to be taken before any Sheriff, Justices or Justice, or Magistrate in *Scotland*, for the Prosecution of any Person who has committed, or is charged with having committed, any Offence or Act for which, under the Provisions of any Act of Parliament,[6] he is liable, upon summary[7] Conviction before any Sheriff, Magistrate, Justices or Justice, to be imprisoned or fined, or otherwise punished,

or to be ordered to do or perform any Act,[8] and to be imprisoned in default of Performance:

(3.) All[9] Proceedings for the Recovery of any Penalty,[10] or Sum of Money in the Nature of a Penalty,[11] which, under the Provisions of any Act of Parliament, may be recovered by summary Complaint or Information, or by Poinding or Distress and Sale, or other summary Process or Diligence of the like Nature,[12] before any Sheriff, Justices or Justice, or Magistrate:

(4.) All Proceedings for the Trial or Prosecution for any Offence, or for the Recovery of any Penalty, under any Act of Parliament by which it shall be provided that Offences committed in contravention thereof, or Penalties thereby imposed, shall be prosecuted or recovered under the Provisions of this Act.[13]

SECTION 3. Subdivision (1). Application of the Act.

[1] The Act does not supersede the procedure authorised by the first three recited Acts which, in many Sheriff Courts, is still retained in preference; but it appears, from section 27, that its procedure is substituted for that of the Small Debt Act, 1837. Neither does it supersede the procedure prescribed by special statutes authorising prosecutions, except in so far as it declares, by section 31, that its provisions shall be substituted for those of the English Act, 11 and 12 Vict., cap. 43, in regard to complaints under any Act of Parliament to which the said English Act is, by special statute, made applicable.—See sections 27, 31 and 32, *infra*.

[2] See note 4 to this section.

[3] Should rather be "defined and regulated," as the summary jurisdiction in question belonged to those inferior Courts before the recited Acts were passed.—See opinion of Lord-Justice General (Inglis) in *Bute and Spouse* v. *More*, 1 Couper, 515, Nov. 24, 1870.

Summary proceedings under the recited Acts.

[4] This subdivision relates to the jurisdiction of the inferior Courts, under the recited Acts, to try common law offences, or offences introduced by statute, but with reference to which the statutes introducing them do not prescribe any particular form of trial. The proceedings in question are—*first*, Proper summary proceedings for the prosecution of *offences* which might be competently tried under the first three recited Acts; and *secondly*, Summary prosecutions *for the recovery of penalties* competent under "The Small Debt Act, 1837."

(i) Under 9 Geo. IV., cap. 29 (Sir William Rae's Act).—The prosecutions for criminal offences before the Sheriff, dealt with in sections 19 and 20 thereof, viz. Where the prosecutor concludes for (*a*) a fine not exceeding £10 sterling, with expenses; or (*b*) imprisonment not exceeding sixty days, with caution for good behaviour, or to keep the peace for six months, under a penalty not exceeding £20.

SECTION 3. Subdivision (1). Application of the Act. Summary proceedings under the recited Acts. (i) Under 9 Geo. IV. cap. 29.

The provisions of the Summary Procedure Act do not apply to trials of crimes before the Sheriff without a jury, dealt with in section 18 of Sir William Rae's Act, which are not summary causes in the sense of this Act.—See opinion of Lord-Justice General (Inglis), 1 Couper, 513, 514.

(ii) Sections 3 and 4 of 11 Geo. IV. and 1 Will. IV., cap. 37, contain further directions for procedure in "prosecutions *of criminal* "*offences* before the Sheriffs of counties, according to the summary "form provided by the last recited Act" (that is, by sections 19 and 20 of 9 Geo. IV., cap. 29).

(ii) Under 11 Geo. IV. and 1 Will. IV. cap. 37.

(iii) Under 19 and 20 Vict., cap. 48.—Prosecutions for *offences* before Magistrates of Royal Burghs, and Her Majesty's Justices of the Peace in Scotland, where the prosecutor concludes for (*a*) a fine not exceeding £5, exclusive of costs, or (*b*) imprisonment not exceeding thirty days, with caution for good behaviour, or to keep the peace for a period not exceeding three months, under a penalty not exceeding £10 (section 1).

(iii) Under 19 and 20 Vict. cap. 48.

By section 2 the forms of procedure and regulations established in regard to the summary trial of offences before the Sheriffs of counties, by the Acts 9 Geo. IV., cap. 29, and 11 Geo. IV. and 1 Will. IV., cap. 37, are made applicable, with a slight variation, to such trials before the Magistrates and Justices.

(iv) Under 7 Will. IV. and 1 Vict., cap. 41 (Small Debt Act, 1837).—Prosecutions *for statutory penalties* before the Sheriff, wherein the penalty shall not exceed the value of £8, 6s. 8d. sterling, exclusive of expenses and fees of extract (section 2). The appropriate decree, being No. 9 of Schedule A of the said Act, "ordains instant execution by arrestment, and also by poinding "and sale, and imprisonment if the same be competent." The procedure under the Small Debt Act, 1837, appears to be superseded by the present Act.—See section 27 hereof.

(iv) Under 7 Will. IV. and 1 Vict. cap. 41.

No offence which could not have been tried summarily under the provisions just mentioned of the recited Acts falls within this subdivision.

In a complaint brought before the Magistrates of Dundee, a private prosecutor, founding on certain old Scotch statutes "anent "the profanation of the Sabbath," set forth that the accused had each rendered themselves liable in the penalty of £10 Scots, or, on failure to pay the same, *to be exemplarily punished in their persons;* and prayed that on conviction they should be adjudged each to suffer *the penalties provided by the said Acts, or any of them,* and to pay expenses.

In a suspension of a sentence following on this complaint,

SECTION 3. Subdivision (1). Application of the Act. Summary proceedings under the recited Acts. What "summary" cases.

heard before a full Bench of the High Court of Justiciary, it was held that the complaint was not competently brought under the Summary Procedure Act; that subdivisions 3 and 4 of section 3 thereof were clearly inapplicable; that the 1st subdivision did not apply, in respect the punishments concluded for and authorised by the statutes founded on exceeded those which could competently be awarded on summary trial under the recited Acts; and that the 2d subdivision did not apply, in respect the statutes did not expressly, or by implication, authorise summary trial; and, moreover, because they authorised an appeal on the merits, which would be excluded if the provisions of the Summary Procedure Act were applied.—*Bute and Spouse* v. *More*, H. C., November 24, 1870, 1 Couper, 495.

In the same case an opinion was expressed by the majority of the Court (diss. Lords Justice-Clerk Moncreiff and Ardmillan), that the prosecutor could not have rendered proceedings under the Summary Procedure Act competent by restricting his conclusions to the limits authorised by 19 and 20 Vict., cap. 48. This opinion proceeded on a consideration of the peculiar and serious character of the offences dealt with, and punishments authorised by the statutes, and the grave social consequences attending conviction, particularly if review was excluded. But where there is nothing in the character of the offence charged, or in the terms of the statute creating it, where it is introduced by statute, repugnant to its being tried summarily, a prosecutor may avail himself of the Summary Procedure Act by restricting his conclusions, even although a larger penalty or heavier punishment might have been inflicted, and, on the other hand, appeal on the merits preserved, had the case not been tried summarily.—See *Tague* v. *Smith*, H. C., June 10, 1865, 5 Irv. 192. This is frequently done in the trial of small thefts, and other crimes not of a serious nature; so much so, that the criminal cases remitted by the Lord Advocate or his deputes for trial in the Sheriff Court are directed to be tried, and are tried, in one of two ways—by the Sheriffs with a jury, or summarily, the middle course of trial on a criminal libel without a jury having for many years past been unknown in practice. The result is, that many cases are every day tried summarily in which heavier sentences might with advantage be imposed than those which are competent on summary conviction.

Subdivision (2). Summary proceedings under special Statutes.

[5] This subdivision regards "proceedings for the prosecution and "punishment of offences created by statute, and directed by the "same statute to be summarily prosecuted to conviction."—Lord Justice-General (Inglis), 1 Couper, 519. It relates to cases of a criminal or quasi-criminal nature, as to the prosecution of which the special statute authorises summary proceedings, and directs that in the event of conviction the accused may either be punished at once by imprisonment, fine, or other punishment, in the discretion of the Sheriff, Magistrate, or Justice, or ordered to do or perform some act, and sentenced to imprisonment in default of performance. The test of whether a case can be tried

summarily under this head is not the amount of the penalty or punishment concluded for, but whether the statute authorises summary proceedings and punishment of the character set forth on conviction. This enactment removes a difficulty which was often experienced before, where the statute which created the offence (probably framed with reference to English forms of procedure) directed summary proceedings, but where, from the character of the offence or the extent of the penalty or punishment authorised to be imposed, the summary jurisdiction of the Sheriff or Justices, regulated by the recited Acts, was inapplicable.—See *Knox* v. *Ramsay*, H. C., July 7, 1837, 1 Swin. 517; and *Byrnes and Others* v. *Dick*, H. C., Feb. 23, 1853, 1 Irv. 145.

SECTION 3. Subdivision (2). Application of the Act. Summary proceedings under special Statutes.

[6] General or local.

[7] It is not necessary that the statute should expressly designate the procedure prescribed as summary if, as in the Master and Servant Act, 11 Geo. IV., cap. 34, it is plainly intended to be of that nature.

[8] To make good or repair damage done; to fulfil a contract (*e.g.* by entering or returning to service), &c.

[9] This subdivision seems to embrace, with the exceptions aftermentioned, all proceedings for the recovery of statutory penalties which do not fall under the two preceding heads. It includes all summary applications for that purpose under any Act of Parliament on which the Magistrate is called upon to adjudicate, and to decide whether the penalty falls to be imposed or not; or where, as a purely ministerial act, he is directed or empowered to grant warrant for recovery by poinding, distress, and sale, or other civil process, the fact of the penalty being due having been otherwise ascertained or fixed in terms of the statute.

Subdivision (3). Summary proceedings for recovery of Statutory penalties.

But it does not extend to "any information or complaint or "other proceeding (1) under or by virtue of any of the statutes "relating to Her Majesty's Revenue;" or (2) "under or by "virtue of any statutory provision for the recovery of any rate, "tax, or impost whatever."—Section 25.

It will be seen presently that one result of suing for such penalties under the Summary Procedure Act is, in many cases, to render immediate imprisonment competent in default of payment, where formerly it could only be imposed in default of recovery by diligence.—See notes to sections 18 and 19, and Schedule K.

[10] See the word "penalty" in the interpretation clause.

[11] The expression "in the nature of a penalty" includes damages due in respect of malicious mischief,—*Robertson* v. *Duke of Athole*, H. C., Oct. 25, 1869, 1 Couper, 348; and compensation under the Master and Servant Act, 1867,—*Holland* v. *The Gauchalland Coal Company*, H. C., Dec. 24, 1867, 5 Irv. 561.

Subdivision (4). Proceedings under Statutes which shall adopt this Act.

[12] Civil diligence.

[13] The provisions of this Act are declared by several statutes passed subsequently to 1864 to be applicable to proceedings under them; amongst others, by 30 and 31 Vict., cap. 141 (Master and

SECTION 3. Subdivision (4).

Servant Act, 1867), section 21 and Schedule II.; 34 and 35 Vict., cap. 112 (The Prevention of Crime Act, 1871), section 17; 34 and 35 Vict., cap. 31 (The Trades Union Act, 1871), section 19; 34 and 35 Vict., cap. 32 (An Act to amend the Criminal Law relating to Violence, Threats and Molestations), section 6; and 38 and 39 Vict., cap 86 (The Conspiracy and Protection of Property Act, 1875), sections 10 and 18.

Proceedings to be instituted by Complaint as in Schedule.

4. All Proceedings for summary Conviction for any Offence, whether at Common Law or under any Act of Parliament, and all Proceedings for the Recovery of any Penalty which may be sued for or recovered in a summary Form, whether such Proceedings are at the instance of a public or private Prosecutor or Complainer, may be instituted by way of Complaint in one or other of the Forms set forth in the Schedule (A) to this Act annexed;[1] and it shall not be necessary to mention in any Complaint any Act of Parliament other than the Act declaring the Offence for which a Conviction is sought, or imposing the Penalty or Forfeiture which is claimed;[2] and it shall be sufficient to refer to the Act or Section of the Act founded on, without setting forth the Enactment in Words at length; and where it is necessary that any such Complaint should be made upon Oath of the Complainer, or of a credible Witness, such Oath may be in the Form of Schedule (B) to this Act annexed;[3] and all Penalties for the Recovery of which in Scotland no special Provision has been made by Act of Parliament may be sued for by the Procurator-Fiscal of the Jurisdiction.[4]

[1] See notes to Schedule A.

[2] Such as an Act continuing or renewing the Act imposing the penalty, or an Act conferring jurisdiction.

[3] Where by the special statute the oath of the complainer or of a credible witness is required (as in the Day Trespass Act), as a preliminary to granting a warrant for apprehension or citation, the want of such an oath will be fatal.—*Smith* v. *Forbes and Low*, H. C., July 22, 1848, Ark. 508; and *Simpson* v. *Crawford and Dill*, H. C., Dec. 22, 1851, J. Shaw, 523. If the oath of the complainer is required, the oath of another party cannot be substituted

for it.—*M'Neill* v. *Coltness Iron Company*, H. C., Dec. 10, 1842, 1 Broun, 454. A separate form for the oath is appended to this Act, which must be signed by the complainer or witness, and by the Judge. It is not necessary under this Act to refer to the oath in warrants for the apprehension and citation of the respondent, and accordingly the forms in Schedules C and D do not bear to proceed upon the oath of the complainer or a credible witness.

SECTION 4.

[4] It will be a question for the Court, in each case, whether the statute libelled on makes special provision, so as to exclude the instance of the Fiscal *qua* Fiscal. It has been decided that this enactment does not take away the right of any member of the public to sue as common informer, if authorised to do so by the special statute.—*Hamilton* v. *Girvan*, H. C., June 15, 1867, 5 Irv. 439. In that case doubts were expressed from the Bench (per Lord Justice-Clerk Patton, p. 455) as to the Procurator-Fiscal's right in such cases to sue, except as common informer; and it is believed that those doubts have hitherto been shared by Procurators-Fiscal. But it is thought that this provision will bear, and should receive, a less limited construction, because the public interest may suffer as much in cases where it is no one's duty to sue (although any one may do so), as where the special statute is altogether silent as to the prosecutor.

No Objection to be allowed to Complaint in point of Form, &c.

5.[1] No objection shall be allowed[2] by the Court[3] to any complaint under this Act for any alleged Defect therein in Substance or in Form,[4] or for any Variance between any such Complaint and the Evidence adduced on the part of the Prosecutor or Complainer at the Hearing thereof, not changing the Character of the Offence charged;[5] but if any such Objection or Variance[6] shall appear to the Court to be such that the Respondent has been thereby deceived or misled, it shall be lawful for the Court to adjourn the Hearing to some future Day, and at the same Time, or at any Stage of the Proceedings,[7] to direct such Amendment to be made upon the Complaint as may appear to be requisite, not changing the Character of the Offence; and such Amendment shall be authenticated by the Signature or Initials of the Judge or Clerk of Court.

Power to Court to direct Amendment of Complaint, if it thinks fit.

[1] The corresponding provision in the English Act, 11 and 12 Vict. c. 43, sec. 1, is, "Provided also that no objection shall be "taken or allowed to any information, complaint, or summons for

SECTION 5. The English and Scotch Summary Procedure Acts compared.

"any alleged defect therein in substance or in form, or for any "variance between such information, complaint, or summons, and "the evidence adduced on the part of the informant or complain-"ant at the hearing of such information or complaint, as herein-"after mentioned; but if any such variance shall appear to the "Justice or Justices present and acting at such hearing to be such "that the party so summoned and appearing has been thereby "deceived or misled, it shall be lawful for such Justice or Justices, "upon such terms as he or they shall think fit, to adjourn the "hearing of the case to some future day."

Special provision is also made by section 9 of the same Act for variances as to time and place between *informations* and the evidence adduced in support thereof, it being declared that they shall not be deemed material, if it is proved that such information was in fact laid within the time limited by law, or if the offence is proved to have been committed within the jurisdiction of the Justices. And power is given to the Justices, if in their opinion such variances or any other variance between the information and the evidence has deceived or misled the party charged, to adjourn the hearing of the case to some future day, *upon such terms as they shall think fit;* but this section does not apply to *complaints.*

Differences in Procedure

In referring to the English Act and proceedings under it, it is necessary to keep in view certain differences in the procedure enjoined by the English and Scotch Acts respectively, which make it impossible to apply exactly the same rules of construction to the instruments employed.

(1.) As to informations, it will be observed, from the foregoing passages in the English Act, that while great latitude is allowed as to variances between the charge and the evidence, no directions are given for amendment of the information. The reason is, that under the Act it is not necessary that the information (which is the proper writ for charging an offence or act punishable by imprisonment, fine, &c.) should be embodied in the conviction; and therefore the form of the information in proceedings under the Act becomes of less importance. But, on the other hand, the conviction forms the record of the whole proceedings, and must set forth the offence of which the accused is convicted, the time and place when and where it was committed, and the penalty imposed; in short, all the essential parts of the charge, although they are stated as proved, not as charged (11 and 12 Vict., cap. 43, sec. 1). The conviction must be as precise in these particulars as the information is required to be in cases not under the Act. It is enough if the conviction is complete and regular; "but this does not justify "an information for one offence, and a conviction for a different "one under another Act of Parliament, or punishable in a diffe-"rent manner."—Paley on Summary Convictions, 5th ed. 76; and *Martin* v. *Pridgeon*, 1 El. and El. 778; and 28 L. J., M. C. 179.

(2.) As a complaint, again, must be narrated *verbatim* in the order following upon it, greater care must be taken in its prepara-

tion.—11 and 12 Vict., cap. 43, sec. 17, and Schedules K 1 and K 2.

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The English and Scotch Summary Procedure Acts compared.

(3.) In Scotland the complaint forms an essential part of the record, without which the validity of the sentence could not be judged of; and, therefore, if it is objected to as being defective in any particular which requires or admits of amendment, an amendment must be made, in order that the Court of review may have before them the full charge on which sentence followed; and the complaint so amended must be complete and unobjectionable. If the defect appears on the face of the complaint, and is objected to, the amendment, if competent, must be made before the case goes to trial, and not *ex post facto* in the judgment, as in the case of an English conviction. If, although the complaint is *ex facie* complete, it appears in the course of the trial that the evidence adduced is at variance with the particulars charged, it is provided by this section not only that an adjournment shall be allowed, but that the complaint shall be amended, so as to make its averments square with the evidence.

(4.) The English Act provides that the Justices shall decide upon what terms an informant or complainer shall be allowed to proceed with a defective or misleading information or complaint. The Scotch Act contains no such provision, and this points perhaps to greater latitude being allowed to prosecutors under the former Act, as it is in the power of the Court to check irregularities or slovenliness in the preparation of informations or complaints by awarding expenses as a condition of allowing the case to proceed.

"No objection shall be allowed."

"The Court."

What are "defects in substance and form."

[2] That is, sustained to the effect of the complaint being dismissed or judgment of absolvitor pronounced.

[3] The inferior court.—See interpretation clause, section 2, *voce* "Court."

[4] As to what constitute "defects in substance and form" the decisions are neither uniform nor specific. It is quite settled that a man cannot be charged with one offence and tried for another (*Kirkin and Others* v. *Jenkins*, 32 L. J., M. C. 140; and *Turner* v. *Postmaster-General*, 34 L. J., M. C. 10); and consequently it is expressly provided that it shall not be competent by amendment to change the character of the offence charged. Thus if a complaint charges the crime of theft, but states particulars applicable to the crime of reset of theft, or of falsehood, fraud, and wilful imposition, the complaint cannot be amended to the effect either of making the particulars applicable to the crime, or the crime applicable to the particulars. Again, if a complaint founds on one section of a statute, but contains averments applicable to an offence under another section of the same statute, or under another statute, the same rule applies. In *Morris and Boyd* v. *Earl of Glasgow*, H. C., Dec. 24, 1867, 5 Irv. 529, a complaint founding on 2 and 3 Will. IV., cap. 68 (Day Trespass Act), and 25 and 26 Vict., cap. 114 (Prevention of Poaching Act), concluded for penalties under both Acts; but it contained averments only relevant to infer a conviction under the former Act. The Justices allowed the complaint to be

SECTION 5. What are "defects in substance and form."

amended by the addition of an averment which constituted a relevant charge under the latter Act, but no oath of verity was taken to the charge as altered. It was held that the amendment allowed changed the character of the offence charged, and the sentence was suspended. In the case of *Martin* v. *Pridgeon*, 28 L. J., N.S., M. C. 179, the defendant was summoned under section 29 of the Towns Police Clauses Act, 1847, for being drunk and riotous on the street; riotous conduct was not proved, and the Magistrates convicted him of drunkenness under 21 Jac. I., cap. 7. An appeal against this conviction was sustained on the ground that this was not a case of variance within the meaning of the first section of 11 and 12 Vict., cap. 43, but a conviction of an offence under a different statute from that founded on. See also *R.* v. *Brickhall*, 33 L. J., M. C. 156.

On the other hand it is equally clear that this section does apply to defects in technical expression and arrangement, and also in specification, and that in regard to such defects wider powers of amendment than previously existed are intended to be given. Thus the statutory form of the complaint need not be followed implicitly; immaterial alterations as to time and place will be allowed (*Jackson* v. *Jones*, H. C., June 1, 1867, 5 Irv. 409); and defective specification, which would be fatal to an indictment, will either be disregarded or cured by amendment if objected to (*M'Dade* v. *Henshilwood*, H. C., May 25, 1868, 1 Couper, 67. See also *Whittle* v. *Frankland*, 31 L. J., M. C. 81).

The intermediate class of cases is more difficult to deal with, viz., where the complaint is substantially defective, but could be amended without changing the character of the offence in the sense of making the charge a different one. Where, for instance, although the meaning of the charge is intelligible enough to the respondent, and he is not deceived or misled, a material part of the complaint is omitted or imperfectly set forth; or where the complaint is irrelevant (in the stricter sense of the word), as where it contains a radically defective or inept statement of the particulars of the offence, or fails to state the penalty concluded for and the alternative, or to refer to the proper section or sections of the Act containing these particulars.

Thomson v. *Wardlaw.*

The following cases illustrate the difficulties which attend this question:—In *Thomson* v. *Wardlaw*, *supra*, sentence was suspended *simpliciter*, on the ground that the complaint was substantially defective, in respect it professed to set forth the penalties competent, but did not do so correctly, and thus was calculated to mislead the Magistrate. Lord Justice-Clerk (Inglis) says (5 Irv. p. 51), "I think this is a very serious objection to the complaint. "I do not think it is a matter of *form*, but of *substance;* and I "think it is of the utmost importance in the working of this Sum-"mary Procedure Act that wherever there is a defect in the sub-"stance of the proceedings, it should be set right; and if it be a "defect in which there can be any material interest to the party "accused, I think it ought to be held as a reason for setting aside

"the proceedings." It will here be observed—*first*, that the word *substance* is not used in the limited sense in which it is used in this section, but in contradistinction to *form;* and *secondly*, that the defect in question was dealt with as one which did not admit of being amended; the proceedings being set aside, and no remit made to the Sheriff.

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But in a subsequent case, *Baird* v. *Rose*, Ayr, Sept. 27, 1865, 5 Irv. 200, in which the same objection was taken, Lord Neaves (who was one of the Judges who decided *Thomson* v. *Wardlaw*), while sustaining the objection, remitted to the Justices to direct the amendment to be made on the complaint, so as to bring it to a conformity with the form No. 2 of Schedule A of the Summary Procedure Act of 1864, and thereafter to proceed with the complaint according to justice. It is doubtful whether such an amendment would be allowed by the High Court of Justiciary after conviction.

Baird v. *Rose.*

The case of *Neilson* v. *Stirling*, H. C., Oct 31, 1870, 1 Couper, 476, may be consulted as showing the sort of irrevelancy in the statement of particulars which will be held as being a defect in substance, and not merely in form. There was, however, a division of opinion on the Bench. The Lord Justice-Clerk (Moncreiff) considered the defect as only want of specification; he said:—"The "difficulty that has weighed with me is, whether, in a suspension "of a conviction which is under the 'Summary Procedure Act,' we "are to go so strictly to work as to hold that that defect, which is "a defect of specification and not of relevancy in the strictest "sense, is to be fatal to the conviction. The meaning of the in-"dictment was plain enough, and there could have been no mis-"apprehension on the part of the accused that he was said to have "gone to collect for this particular society." And Lord Deas, while holding the libel relevant, said:—"If I were to go beyond "that, I should not be inclined to hold that a party is confined to "pleading guilty or not guilty to such a complaint. He may plead "any objections he thinks proper; and I cannot but think it is a very "serious matter that without one word to that effect on the occa-"sion of the trial, he is to be permitted to come forward at this "stage and insist upon such objections as this to the relevancy of "the complaint."

Neilson v. *Stirling.*

In the two following cases a wider construction appears, at first sight, to have been given to this section; but on examination it will be seen that the decisions do not go very far. In *M'Dade* v. *Henshilwood*, *supra*, the complaint, which charged an offence under the Act 30 and 31 Vict., cap. 141, contained no definite averment of a contract of service. The Court held with difficulty that there were statements in the complaint which enabled them to infer such a contract; but it is plain, from the opinion of the Lord Justice-Clerk (Patton), that a complaint so defective would not again be sustained. He said (1 Couper, p. 73):—"The Court look for and "desire that in future, in complaints under this Act, care be taken "to set out clearly and unambiguously what the precise contract

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"is, the breach of which is sought to be visited with the penalties "provided by the Act." And (p. 75), "I may state, in conclu-"sion, that the Court, in arriving at the opinion I have just "expressed, especially upon the first and most important objection, "viz., in regard to the setting forth of the contract of service in "the complaint, is influenced by the provisions of the 20th section "of the statute, which points to the rejection of objections which "go merely to the defect of form. And on the ground also that the "suspender, as appears from his own statements contained in the "bill, understood perfectly what was intended, and was clearly put "to no disadvantage."

Owens v. *Calderwood.*

In *Owens* v. *Calderwood*, H. C., Feb. 20, 1869, 1 Couper, 217, the complaint charged an offence under 8 and 9 Vict., cap. 33, section 102, and a bye-law of a railway company made in virtue of the said section, and of a subsequent Railway Act. The said bye-law provided that "every person *defrauding* or attempting to "*defraud* the company by travelling in a carriage of a superior "class to that for which he has obtained a ticket is hereby sub-"jected to a penalty not exceeding forty shillings." The complaint did not contain an averment that the respondent had defrauded the company by so travelling; and an objection having been taken to the relevancy, the Sheriff allowed the complaint to be amended by the insertion of an averment to that effect.

In a suspension of a sentence following on this complaint, although the main question discussed was whether the amendment had been made and authenticated at the proper time, the Court did not indicate an opinion that the amendment was incompetent if timeously made. This point does not, however, appear to have been argued by the suspender.

In the case last-mentioned, the complaint being defective in a material respect, the sentence would probably have been suspended if the objection had not been taken before the Sheriff and met by amendment.—See *Craig* v. *The Great North of Scotland Railway Company*, H. C., Nov. 20, 1865, 5 Irv. 206, which points to this anomalous result (not unknown in practice) that a respondent who does not object to the relevancy of the complaint may be in a better position than one who does; as he has first a chance of acquittal, and then, if convicted, an objection to the relevancy before the Court of review, which, if the objection is well founded, will probably suspend *simpliciter* and not remit the case to the Sheriff.

Wilson v. *Dykes.*

In the recent case of *Wilson* v. *Dykes*, H. C., Feb. 2, 1872, 2 Couper, 183, the complaint charged the theft of a dead pheasant or a pheasant totally disabled by a shot, and the property or in the lawful possession of His Grace the Duke of Hamilton. The respondent pleaded guilty and was sentenced to imprisonment for twenty-four hours. This sentence was suspended by the High Court of Justiciary, on the ground that the charge being the theft of a wild animal, which from its nature is not generally private property, and therefore not necessarily private property, the com-

plaint ought to have set forth how the pheasant became the property of the Duke of Hamilton. The Lord-Justice Clerk (Moncreiff) and Lord Neaves held that the complaint failed for want of sufficient specification in an essential point. Lord Cowan was of opinion that there was not merely a want of specification, but that there was not a proper or relevant charge of theft. (Perhaps irrelevancy in respect of want of specification would correctly describe the defect.) Some important observations fell from the Bench in regard to the scope of the 5th section of the Summary Procedure Act. The Lord Justice-Clerk (Moncreiff) says (p. 187), "It is said, and quite accurately, that in charging the minor "offences of which the Sheriff can take cognisance under the forms "of the Summary Procedure Act, the same amount of detail is "not required as would be necessary to support an indictment for "the more serious offences prosecuted in this Court. But under "the form adopted there can be no review on the facts; and "when a case is presented of the unusual nature disclosed by this "complaint, it is right to see that it is accurately framed, so as to "amount in substance to a sufficient charge to bring it within the "category of theft." And Lord Cowan says (p. 190), "The very "fact of the proceedings being taken in terms of the provisions of "that Act renders it the more necessary that we should see that "the crime is thoroughly and relevantly set forth; because, as it "is only upon the relevancy that we have any power of review, "we cannot see what was done by the Sheriff by looking at the "evidence. What we have to consider in the case is whether "the crime of theft is sufficiently stated; for I feel great indulg-"ence to Procurators-Fiscal and other prosecutors in inferior "Courts in libelling summary cases, and would not interfere on "account of a mere want of due form, or because of defect in "expression; yet, where a crime such as theft is charged, care "must be taken, because it gives to the person charged the "character of thief, and fixes to him the effects and stigma of "previous conviction."

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The case of *Rae* v. *Linton*, H. C., Dec. 11, 1874, 2 Rettie, Justiciary Cases, p. 17, may also be referred to as shewing how strictly the Court deal with irrelevancy, or want of specification amounting to irrelevancy, in a summary complaint which charges a crime. There the complaint was not brought under the Summary Procedure Act, but under the Edinburgh Provisional Order Act, 1867, by section 187 of which review was limited to certain specified grounds. Lord Neaves said (p. 19), "The objection is to the rele-"vancy. It was endeavoured to include irrelevancy under incom-"petency. But relevancy is not competency. A panel pleads to "relevancy quite apart from competency. This complaint does "not therefore fall under the clause of the statute introducing a "limitation of review. It is brought before us in the exercise of "our jurisdiction, which requires us, amongst other things, to see "that nothing is made a crime in a Police Court which is not a "crime in itself." And the Lord-Justice Clerk (Moncreiff) added

Rae v. *Linton.*

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(p. 19), "It has been decided in several cases that, where an act "set forth in a criminal libel is not of itself criminal, but innocent "or indifferent, the libel will not be rendered relevant merely by "the addition of epithets or adjectives, but that the prosecutor "must set out in his libel the specific facts which give the act a "criminal character."

The result of these decisions seems to be as follows:—(1.) If the complaint is substantially defective in some material part of the charge, the defect will be held fatal and amendment incompetent; and this rule will be more rigorously applied where a crime, in the stricter sense of this word, is charged, than in the case of a police offence or a suit for a money penalty. This is in accordance with the rules of construction previously observed (see *Donaldson* v. *Buchan*, H. C., Nov. 18, 1861, 4 Irv. 109, per Lord-Justice Clerk (Inglis), p. 113), which are none the less necessary now that review on the merits is in most cases excluded (section 16); and as this is merely a Procedure Act, it could not be held to have effected an important alteration on the law in this respect, without the clearest expression of intention. (2.) A respondent will not, in general, be held barred from objecting to a complaint in respect of such a defect, by reason of his not having done so in the inferior Court, especially if he was not defended by counsel or agent. And (3.) When an amendment has been allowed, a respondent may, in some cases, be barred from objecting in the Court of review, if he has expressly consented to such amendment, or has not objected to its being made, when the circumstances are such as to satisfy the Court that he has not been put to disadvantage; as, where he has been defended by counsel or agent, or where it was plainly for his interest to have the matter disposed of at once. But it must be remembered that, in criminal cases, there are some objections which, for reasons of public expediency, cannot be obviated, even with the accused's express consent,—*Penman* v. *Watt*, H. C., 24th and 25th Nov. 1845, 2 Brown, 586, per Lord Justice-General, p. 594; and *Campbell* v. *Brown* (case of Kilberry), 3 W. and S. 441.

Objections to variances between the complaint and the evidence not to be allowed.

[5] This is an important provision, and may with safety be given a wider application than that regarding defects in the complaint. Many a prosecution has broken down when there was the clearest evidence of the crime having been committed, on account of the place, time, or *modus* not being exactly that set forth in the complaint.

[6] The variance here meant is between the charge as stated and the same charge as proved. The complainer will not be allowed to prove a different offence.—*Martin* v. *Pridgeon*, *supra*.

Amendment of the complaint when to be made.

[7] The amendment should be made and authenticated when it is allowed:—"It is true that the Act does not require it to be stated "in the record when an amendment was allowed, or even that it "was allowed. All that is required is, that it should be signed or "initialed by the Judge. But it appears to me that when an "amendment of this kind was made, it should have been at the "sight of both parties before the case proceeded further, and it

"was loose and slovenly to go on with the pleadings while it was "being written out. But I am not prepared to say that substantial "injustice arose to the suspender from this loose and slovenly "procedure."—*Owens* v. *Calderwood*, 1 Couper, 220, H. C., Feb. 20, 1869, per Lord Justice-General (Inglis).

SECTION 5.

Respondent may be cited to appear, or apprehended on a Warrant.

6. On such Complaint being laid before the Court, it shall be lawful for the Court to grant warrant to cite the Respondent by delivering a Copy of the Complaint, with Warrant of Citation, to him personally, or, if he cannot on Search be found personally, leaving such Copy at his usual Place of Abode, to appear before the Court on Induciæ of not less than Forty-eight Hours, or (where Apprehension is competent) to grant a Warrant for the Apprehension and interim Detention of the Respondent: Provided that where the Complaint shall pray for a Warrant of Apprehension, the Court may in its discretion grant, in place of such Warrant, a Warrant for the Citation of the Respondent as aforesaid; and it shall be lawful to annex to such Warrant of Citation or Apprehension a Warrant to cite Witnesses and Havers for both Parties,[1] and also (where such Procedure is otherwise competent) a Warrant to search for, seize, remove and secure all Goods, Documents, or other Articles mentioned or referred to in the Complaint.

[1] In some cases the absence of a warrant to cite witnesses may form a good objection to a conviction.—See *Cockburn* v. *Johnson and Robson*, H. C., June 3, 1854, 1 Irv. 492, which was a prosecution under 9 Geo. IV., cap. 29. But there the respondent was only 13 years of age, the complaint was not served upon her, and no notice was given to her father; and the absence of the warrant of citation was only one element in the oppressive character of the proceedings.

The Court may proceed in absence of the Respondent in certain

7. If the Respondent after being cited shall fail to appear at the Time and Place mentioned in the Warrant of Citation, it shall be lawful for the Court, upon Proof[1] that the Respondent has been duly cited, to issue a Warrant in the Second In-

SECTION 7. cases, or issue a Warrant for his Apprehension.

stance for his Apprehension and interim Detention, or the Court may adjourn the Hearing to a future Diet, with Liberty to the Respondent to appear at such adjourned Diet, and may in its Discretion appoint Intimation to such adjourned Diet to be made to the Respondent; and in Cases where the Complaint concludes for a pecuniary Penalty only in the First Instance, or where the Act of Parliament founded on authorizes Procedure without the Presence of the Respondent, the Court may, without adjourning, proceed to hear and dispose of the Complaint in the Absence of the Respondent.[2]

[1] In the bill the words "by the oath of the officer giving the "citation" were here inserted, but they were deleted in the House of Lords. No execution of citation is required, and the Court may satisfy themselves by a report from the officer or otherwise as to the respondent having been duly cited.

[2] The complaint must in such cases be established by competent evidence, unless the special Act authorizes conviction in default of appearance, in which case it is not necessary to lead evidence.—Section 15.

As to Execution of Warrants.

8. Every Warrant granted under the authority of this Act for the Citation or Apprehension of a Respondent, or for the Citation of Witnesses, or for the Apprehension of a Witness as hereinafter provided, may be lawfully and competently executed at any place within the County in which it is granted, and that either by an Officer of the Court, or Magistrate granting the Warrant, or by a Constable acting under the authority of any Act of Parliament, although addressed to Officers of the Court issuing the Warrant, and at any place within Scotland by any Constable or other Officer of the Law, or by an Officer of the Court or Magistrate granting the same,[1] and all such Warrants and Citations may be in the forms contained in the Schedules C, D, E, and F to this Act annexed.

[1] This section affords facilities, which did not previously exist, for the execution of warrants for the citation and apprehension of witnesses and respondents. Apart from statutory enactment, no

such warrant issued by a Sheriff or other inferior Judge could be executed beyond his own jurisdiction, without the interposition of the supreme Court, or of a Judge of the territory in which the warrant fell to be executed. In regard to the apprehension of accused persons, a statutory exception to this rule was introduced by section 25 of 1 and 2 Vict., cap. 119 (The Sheriff Court Act, 1838), in favour of criminal warrants granted by any Sheriff against any person charged with having committed a crime or offence within the jurisdiction of the said Sheriff; it being declared that such warrants should be sufficient for the apprehension of the said person within any other county, and for conveying and disposing of the said person in terms of the warrant, without the necessity of its being backed or indorsed by any other Magistrate; provided always that the said warrant should be executed against the person mentioned therein, either by a messenger-at-arms or by an officer of the Court where the same was issued. It will be observed that this enactment was limited to warrants granted by the Sheriff, and that such warrants could only be executed by a messenger-at-arms, or by an officer of the Court where the same were issued.

SECTION 8. Execution of Warrants for Apprehension, and Citation of Respondent and Witnesses.

Previous Enactments.

As to the citation of the accused persons, the 24th section of the same Act (1 and 2 Vict., cap. 119) provides that, in the Sheriff Court, parties in any civil or criminal action or proceeding may be cited on the warrant of the Sheriff, indorsed by the Sheriff-clerk of the sheriffdom in which the party is found.

As to the citation of witnesses, it was enacted by section 8 of 11 Geo. IV. and 1 Will. IV., cap. 37, "That when the attendance of any person shall be required as a witness in any criminal cause or proceeding, or in any prosecution for a pecuniary penalty before any Court or Magistrate in Scotland, such person, although not residing within the jurisdiction of the Court or Magistrate granting the warrant of citation, may be cited on the warrant of such Court or Magistrate, and this either by a messenger-at-arms or by an officer of the Court or Magistrate granting the warrant, or by an officer of the place in which such person may be for the time; and such citation shall be sufficient to enforce the attendance of such person as a witness in all respects as if such person had been resident within the jurisdiction of the Magistrate by whom such warrant shall have been granted." And in regard to proceedings in the Sheriff Court, it was enacted by section 24 of the Sheriff Court Act, 1838, that it should be competent to cite witnesses within Scotland in any civil or criminal action or proceeding in Sheriff Courts, by warrant of such Courts indorsed by the Sheriff-Clerk of the sheriffdom in which such warrant should be executed; and the same provision was made as to Letters of Second Diligence issuing from the Sheriff Court.

Effect of this Clause.

This section of the Summary Procedure Act applies to warrants for the citation or apprehension of witnesses and respondents, whether granted by Sheriff, Magistrate, or Justice of the Peace in Scotland. It is confined to warrants granted under the authority

SECTION 8. Execution of Warrants.

of this Act and executed in Scotland; the warrants do not require to be backed or indorsed by any other Magistrate, or by the Clerk of any other Magistrate; and, although addressed to officers of Court, may be executed within the county in which they are granted, either by an officer of Court or by a constable acting under the authority of any Act of Parliament, and at any place within Scotland by any constable or other officer of the law, or by an officer of Court.

As to execution of Warrants beyond Scotland.

9. The Provisions of the second recited Act relative to the execution of Sentences and of Decrees for Penalties and Expenses beyond the Jurisdiction of the Court or Judge by whom the same have been granted,[1] shall be applicable to the execution of Convictions and Judgments pronounced under the authority of this Act; and the Provisions contained in an Act passed in the 11th and 12th years of the Reign of Her present Majesty, intituled An Act to Facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to Persons charged with indictable Offences, for the enforcement of Warrants granted by Sheriffs and Justices in Scotland by Indorsation in England and Ireland, shall be applicable to Warrants granted by Magistrates of Burghs in Scotland;[2] and the said Provisions are also hereby extended and made applicable to all Warrants issued in Scotland under the authority of this Act.[3]

11 and 12 Vict., cap. 42.

[1] 11 Geo. IV and 1 Will. IV., cap. 37, section 8.—"Any sentence "or decree for any pecuniary penalty or expenses pronounced by "any Court or Magistrate, may be enforced against the person or "effects of any party, against whom any such sentence or decree shall "have been awarded in any other county, as well as in the county "where such sentence or decree is pronounced; provided always "that such sentence or decree, or an extract thereof, shall be "first produced to and indorsed by a Court or Magistrate of such "other county competent to have pronounced such sentence or "decree in such other county." By section 6 of the same Act it is provided, "That it shall be lawful for any officer of the "law, when lawfully conveying any prisoner to any gaol, or before "any Magistrate, to convey such prisoner through any county "adjoining to that over which the Magistrate possesses jurisdiction

"before whom such prisoner is to be carried for examination, or to "that in which the gaol is situated to which such prisoner is to be "committed, in the same way in all respects as if such officer had "been an officer of the county through which he may so pass, and "as if the warrant under which he is acting had been granted or "indorsed by a Magistrate of such county."

SECTION 9. Execution of Warrants beyond Scotland.

[2] 11 and 12 Vict., cap. 42, section 15.—"And be it enacted that "if any person against whom a warrant shall be issued by the Lord "Justice-General, Lord Chief-Justice-Clerk, or any of the Lords "Commissioners of Justiciary, or by any Sheriff or Steward-Depute "or Substitute or Justice of the Peace of that part of the United "Kingdom of Great Britain and Ireland called Scotland for any "crime or offence against the laws of that part of the United "Kingdom, shall escape, go into, reside, or be, or shall be supposed "or suspected to be, in any county or place in England or in "Ireland, it shall be lawful for any Justice of the Peace in and "for the county or place into which such person shall escape or go, "or where he shall reside or be, or shall be supposed or suspected "to be, to indorse (K) the said warrant in manner herein before-"mentioned; and which said warrant so indorsed shall be a "sufficient authority to the person or persons bringing the same, "and to all persons to whom the same was originally directed, "and also to all constables and other peace officers of the county "or place where the Justice so indorsing such warrant shall have "jurisdiction, to execute the said warrant in the county or place "where it is so indorsed, by apprehending the person against "whom such warrant shall have been granted, and to convey him "into the county or place in Scotland next adjoining to that part "of the United Kingdom called England, and carry him before the "Sheriff or Steward-Depute or Substitute or one of the Justices of "the Peace of such county or place, and which said Sheriff, "Steward-Depute, or Substitute, or Justice of the Peace, is hereby "authorised and required thereupon to proceed in such and the "same manner, according to the rules and practice of the law of "Scotland, as if the said offender had been apprehended within "such county or place in Scotland last aforesaid."

Schedule (K), referred to in the section just quoted, is as follows:—

"(K)

"INDORSEMENT in Backing a WARRANT.

"To Wit, { Whereas proof, upon oath, hath this day been made before me, one of Her Majesty's Justices of the "Peace for the said (county) of , that the name of J. S., "to the within warrant subscribed, is of the handwriting of the "Justice of the Peace within mentioned: I do therefore hereby "authorise W. T., who bringeth to me this warrant, and all other "persons to whom this warrant was originally directed, or by whom "it may lawfully be executed, and also all constables and other

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"Peace officers of the said (county) of , to execute the "same within the last mentioned (county),* and to bring the said "A. B., if apprehended within the same (county), before me, or "before some other Justice or Justices of the Peace of the same "county, to be dealt with according to law.

"Given under my hand this

"day of 18

"J. L.

"* The words following this asterisk are to be used only where "the Justice backing the warrant shall think fit, and may be "omitted in backing English warrants in Ireland, Scotland, &c., "or in backing Irish or Scotch warrants, &c., in England."

The section just quoted is confined, it will be seen, to warrants issued by any of the Lords Commissioners of Justiciary, or by any sheriff or Justice of the Peace. Its provisions are, by the present section, declared to be applicable to warrants granted by Magistrates of burghs in Scotland.

[3] This enactment extends the application of section 15 of 11 and 12 Vict., cap. 42, to *all warrants* issued under the authority of this Act in Scotland; but its effect, it is thought, is merely to extend to warrants against respondents in civil or quasi-criminal proceedings under this Act provisions which were previously confined to criminal warrants. The words, however, if taken in their widest sense, include not only warrants for the citation and apprehension of respondents, but also warrants for the citation and apprehension of witnesses. The Acts which regulate the citation of witnesses resident in England or Ireland are 45 Geo. III., cap. 92, and 54 Geo. III., cap. 186.—See Dickson on Evidence, 2d Ed., p. 1099, sections 1894 and 1895. Under section 3 of 54 Geo. III., cap. 186, it was provided:—"That it "shall be lawful for any Judge of any of His Majesty's Courts "of Record in Westminster, of the Court of Session in the County "Palatinate of Chester, or of any of the Courts of Great Sessions "in Wales, or for any Judge in any of His Majesty's Courts of "Record in Dublin, to indorse any Letters of Second Diligence "issued in Scotland for compelling the attendance of any witness "or witnesses resident in England, Wales, or Ireland upon any "criminal trial in Scotland; and such letters shall, upon such in-"dorsement, have the like force and effect as the same would have "in Scotland, and shall entitle the bearer thereof to apprehend the "witness or witnesses mentioned therein, and to convey such wit-"ness or witnesses to Scotland for the purpose of the trial or trials "in respect of which such letters shall have been issued, without "any tender of any expense or expenses of any such witness or "witnesses, anything contained in the said last recited Act of the "45th year aforesaid notwithstanding."

It is believed that, in practice, it has been found easier to settle with witnesses as to their expenses than to have recourse to the means of compulsion here given.

The effect of the 9th section of the Summary Procedure Act, if it applies to warrants for citation or apprehension of witnesses, is to make them effectual when indorsed by any Justice of the Peace of the county or place in England or Ireland where the witness resides. If it does not apply to such warrants, the presence of witnesses in trials under this Act can only be enforced in virtue of the provisions of 54 Geo. III., cap. 186, viz., *in criminal trials*, and that by obtaining the indorsation of Letters of Second Diligence by a Judge of one of the superior Courts mentioned in section 3 of 54 Geo. III., cap. 186; and in trials of a civil character their attendance cannot be enforced at all.. The last named Act was repealed by section 34 of 11 and 12 Vict., cap. 42, but, from section 32, it would appear that, as to Scotland, the repeal is limited to the provisions for backing warrants against persons charged with a crime or offence, which are superseded by sections 14 and 15 of 11 and 12 Vict., cap. 42.

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10. If any Person cited as a Witness by a Warrant under the Authority of this Act shall neglect or refuse to appear at the Time and Place appointed by the Warrant, and no just Excuse shall be offered in his Behalf, it shall be lawful for the Court before whom such Person has been cited to appear to issue a Warrant for his Apprehension; or, if the Court shall be satisfied by Evidence upon Oath that it is probable that such Person will not attend without being compelled so to do, it shall be lawful for the Court to issue a Warrant in the first instance for the Apprehension of such Person; and any Witness who shall wilfully fail to attend after being duly cited, or who shall refuse to be sworn or to be examined on Affirmation, or who, after the Oath or Affirmation has been administered to him, shall refuse to answer any question which the Court shall allow, or to produce Documents in his Possession when required by the Court, may be summarily punished for his Contempt by Imprisonment or Fine, such Punishment not exceeding that which the Court would be entitled to award in case of Conviction upon the Complaint.

Warrants may be issued for Apprehension of Witnesses.

11. Any Respondent brought before the Court by a Warrant of Apprehension under the Authority

Respondent may require Adjournment of Diet.

SECTION 11 Adjournment of Diet.

of this Act shall be entitled to require a Copy of the Complaint, and also to require that the Hearing shall be adjourned for a Period of not less than Forty-eight Hours; and such Requisitions shall be complied with if made before the Examination of any Witness on the Merits shall have commenced; but no such Requisition shall be competent where a Copy of the Complaint shall have been delivered to the Respondent personally Forty-eight Hours before the Hearing;[1] and any Interlocutor adjourning the Diet may be in the Form No. 1. in the Schedule (H) to this Act annexed.[2]

[1] There is a similar provision in section 4 of 11 Geo. IV. and 1 Will. IV., cap. 37, but it is there provided that the adjournment shall be for a space of not less than forty-eight hours after the copy of the libel shall be served upon the respondent. Words to the same effect, viz., "after delivery of such copy," were inserted in the bill, but were struck out in the House of Lords, on the ground that if the adjourned diet was made dependent on the time at which the copy of the complaint was delivered, the Judge could not fix the precise day for the adjourned hearing. The adjournment will therefore be for forty-eight hours from the time when it is demanded by the respondent; and if a copy of the complaint is not at once delivered, the complaint will be dismissed, or a further adjournment directed, in the discretion of the Court.

[2] The hearing may be adjourned and the interlocutor signed by one Justice, although two may be required for conviction.—Schedule (H) and section 21 of this Act, and *Carruthers* v. *Jones*, H. C., June 1, 1867, 5 Irv. 398.

Court may adjourn the Hearing and detain the Respondent.

12. Subject to the Provisions contained in the preceding Section,[1] no Adjournment of the Hearing shall take place when the Respondent pleads Not Guilty, or at any other Stage of the Proceedings, unless the Court shall think fit[2] to order an Adjournment: Provided that where the Respondent has been brought into Court upon a Warrant of Apprehension,[3] it shall be lawful for the Court to grant Warrant, in the Form No. 2. in the Schedule (H) to this Act annexed, to detain him in Prison until the Period to which the Hearing shall be adjourned, or until he finds sufficient Caution to appear at all future Diets of the Court.[4]

[1] That is, where the respondent has not been served with a copy of the complaint, and demands an adjournment. SECTION 12

[2] The bill contained the words "on the motion of one of the "parties," but these words were struck out, as they would have rendered the consent of one of the parties necessary to an adjournment, and thus deprived the Judge of the power of adjourning *ex proprio motu.* This power is inherent in every Court, provided it is not oppressively exercised—*Bruce* v. *Linton*, 2d Div., Nov. 30, 1860, 23 D. 85, per Lords Justice-Clerk (Inglis) and Cowan, and *Carruthers and Others* v. *Jones*, H. C., June 1, 1867, 5 Irv. 398, per Lord Justice-General (Inglis); it is not confined to the cases provided for in sections 7 and 11 of this Act—*ibidem.* One Justice may adjourn, though two are required to convict—*ibidem* and section 21. The Judge may refuse adjournment, although both parties concur in asking it—*Anderson* v. *Allan*, H. C., Mar. 7, 1868, 1 Couper, 4, and 6 Macph. 957; provided his so refusing does not amount to oppression.

[3] Whether in the first or second instance.

[4] Without such a power as is here given it would not be competent in some cases to incarcerate the respondent during an adjournment even where apprehension in the first instance is competent.—See *Bruce* v. *Linton, supra.* This was a case under the statutes 9 Geo. IV., cap. 58, and 16 and 17 Vict., cap. 67. The latter statute authorises apprehension in the first instance in place of citation, and gives the Magistrates power to adjourn, but no power to incarcerate the accused during adjournment. It was held incompetent to grant warrant to detain the respondent in prison until the period to which the hearing was adjourned, or until he found sufficient caution to appear at all future diets of the Court; but that, in the circumstances, the sentence was not invalidated by such a warrant having been granted.

As to signing of Convictions and Warrants.

13. Any Sheriff, Magistrate, or Justice, though out of his County or Jurisdiction, may sign any Conviction, Judgment, Warrant, or Interlocutor under this Act, provided the Evidence, and every other Proceeding necessary to support such Conviction, Judgment, Warrant, or Interlocutor, shall have been had before him when within his County or Jurisdiction.

Procedure at Hearing in Presence of the Respondent.

14.[1] Where the Respondent shall be present at the Hearing the Substance of the Complaint shall be read to him, and he shall thereupon be required to plead in common Form, and the Respondent may then state Objections to the Competency or

SECTION 14 Proceedure at Hearing in presence of the Respondent.

Relevancy of the Complaint or Proceedings;[2] and if no Objections are stated, or if such Objections are stated and repelled, or are obviated by Amendment of the Complaint or Adjournment of the Diet as herein-before provided,[3] the Respondent's Plea shall then or at such adjourned Diet be recorded, and the Plea, if the same be Guilty,[4] shall be signed by the Respondent, or by a Judge or the Clerk of Court if the Respondent cannot write; and if the Plea be Not Guilty, the Prosecutor or Complainer shall proceed to establish his Complaint by such Evidence as is competent, and the Respondent may, if he think fit, lead such Evidence as is competent, after which[5] the Court shall pronounce Judgment at the same or any adjourned Diet.

[1] The 14th section of the Bill, as it left the House of Commons, contained provisions to meet the event of the prosecutor or complainer failing to appear at the diet for the hearing of any complaint, or at any adjourned diet, or of his having declined to insist in his complaint. But it was thought safer to leave it to the ordinary rules of law to regulate procedure in such an event. Accordingly, if the prosecutor or complainer does not appear, the complaint will be dismissed; and if he does appear, and, before proof is commenced, states that he does not insist in his complaint, it will be in the discretion of the Court to allow him to desert the diet *pro loco et tempore*, or to direct that the diet shall be deserted *simpliciter*. If the complaint is abandoned after the commencement of the proof, judgment of absolvitor will be pronounced.

[2] Although no provision is made in Schedule I for recording objections to the relevancy or competency of a complaint or proceedings, the Sheriff or Justices are not precluded from adding to that form by noting such objections, and it is proper that they should do so. In section 17 of the Bill, as it left the House of Commons, it was provided that the Judge should, if required, take a note of any objection to the relevancy or competency of the charge or proceedings to which he might not have thought proper to give effect by amendment of the complaint in manner herein-before provided. But this provision, as already explained, was struck out in the House of Lords.

[3] See section 5.

[4] The question put to the respondent should be, whether he is guilty or not guilty, and he should be asked to answer that question categorically. It is dangerous to spell an admission of liability out of answers to less definite interrogatories put to the respondent by the Judge, and many sentences have been suspended because

the Judge had misconstrued the accused's answers or statements as amounting to a plea of guilty.—See the cases of *Black* v. *Marshall*, H. C., July 8, 1843, 1 Broun, 567; *Logan* v. *M'Adam*, H. C., Dec. 5, 1853, 1 Irv. 329; *Bone* v. *Bird*, H. C., Dec. 3, 1855, 2 Irv. 279; *Hopton* v. *Wicks*, H. C., March 5, 1858, 3 Irv. 51. If there is any doubt as to the meaning of the respondent's plea, it should be taken as a plea of not guilty.

SECTION 14 Procedure at Hearing in presence of the Respondent.

[5] At the conclusion of the evidence both parties may address the Court if they think fit, the complainer or his procurator first, and then the respondent or his procurator.

15. Where the Court shall proceed to dispose of the Complaint in the Absence of the Respondent, Judgment shall not be pronounced against him until the Complaint has been established to the satisfaction of the Court, by such Evidence as is competent, unless the special Act authorises Conviction in default of Appearance.

Procedure at Hearing in Absence.

16. It shall not be necessary in any Proceeding under the Authority of this Act to record or to preserve a Note of the Evidence adduced,[1] but the Record shall set forth, in the Form of the Schedule (I) to this Act annexed, the Respondent's Plea, if any, the Names of the Witnesses, if any, examined upon Oath or Affirmation, with a Note of any documentary Evidence that may be put in.[2]

Form of Record.

[1] The scope of this section is now well defined by decision.

When Note of Evidence need not be taken.

(1.) Where the prosecution is at common law, or under a statute which does not direct or authorize a note of the evidence to be taken, the Judge may refuse to preserve a note of the evidence adduced, and thus exclude review on the merits. Opinions to this effect were expressed in the early case of *Gardner* v. *Dymock*, H. C., Jan. 9, 1865, 5 Irv. 13—see opinion of Lord Cowan, p. 21, Lord Deas, p. 26-27, and Lord Ardmillan, p. 35; and in subsequent cases the point was held to be quite settled—see opinions in *Bute & Spouse* v. *More*, H. C., Nov. 24, 1870, 1 Couper, 495, and *Halliday* v. *Bathgate*, *infra*. In such cases the Act dispenses with the common law obligation to preserve a note of the evidence in summary causes, which was authoritatively recognised in the case of *Penman* v. *Watt*, 2 Broun, 586, and other cases.

Gardner v. *Dymock*.

(2.) Where the special statute expressly directs that a note of the evidence shall be preserved, this section does not take away the right thereby conferred on the parties; the object of the Summary

SECTION 16 Form of Record. When must a Note of the Evidence be taken and preserved?

Procedure Act being to regulate procedure, and not to supersede the special Act, it must be read in consistency therewith. In *Wright* v. *Dewar*, H. C., Nov. 27, 1873, 2 Couper, 504, Lord Cowan said (p. 513), "Since the Summary Procedure Act was passed "it has never been held that it excludes reference to the special "statute under which the proceedings are taken. It simply "regulates procedure for the trial of the offence. As regards "finality of procedure or the mode of review, that depends entirely "on the particular statute which is said to have been contravened. "Where the prosecution is for an offence at common law, the sole "ground on which we are unable to review the sentence on its "merits is, that the Summary Procedure Act dispenses with a "record of the evidence. But in a prosecution under a statute "which contains an express clause regulating the mode of review, "as in this case, by appeal to the next Circuit Court of Justiciary, "and providing for the finality of the judgment, unless by such "appeal that clause must be operative the case of *Halliday* v. "*Bathgate* raised all these questions, and is quite conclusive."

(3.) Again, where the special statute provides for an appeal being taken, and directs the Sheriff or Justice to take notes of the evidence adduced, *if required by either party*, such Judge is not entitled to refuse to do so if either party asks that this should be done. But if neither party requires the Judge to take a note of the evidence, the right of appeal on the merits will be lost, as indeed it would be even if the prosecution were not brought under this Act. This was decided in the case of *Halliday* v. *Bathgate*, H. C., June 1, 1867, 5 Irv. 382. In that case a complaint charging a contravention of the Tweed Fisheries Act, 1857, was brought under the Summary Procedure Act. The Tweed Fisheries Act by section 96 provided for an appeal being taken, and by section 93 provided that "no written record of evidence shall be necessary "unless either party, before such complaint shall be heard, requires "the Sheriff or Justice, or Justices, to take note of the evidence to "be adduced, which such Sheriff or Justice, or Justices, shall do "or cause to be done; and the notes so taken shall be deemed and "held, in any subsequent proceedings, as a sufficient record of the "evidence under such complaint." The accused did not ask the Sheriff to take a note of the evidence, and no note was taken; but in a suspension he argued that the prosecutor, by bringing the complaint under the Summary Procedure Act, had taken away the right of appeal under the Tweed Fisheries Act, and thus extended the jurisdiction of the Sheriff, contrary to the 27th section of the Summary Procedure Act. The Lord Justice-General (Inglis), in delivering the opinion of the Court, said (p. 396), "But the Court are of "opinion that that is not the effect of the 16th section of the Sum-"mary Procedure Act. They hold that the words which are there "used—'it shall not be necessary' to do so and so—are not "sufficient to repeal clauses in former Acts of Parliament expressed "in imperative words, which is the case with that portion of the "93d clause of the Tweed Fisheries Act which I have just read.

Halliday v *Bathgate*

"They construe the 16th section of the Summary Procedure Act "as dispensing with a record of the evidence only so far as that "Act is concerned, and so far as regards cases to which no other "particular enactment specially applies in the matter of evidence. "It shall not be necessary generally for the Justices, or the Sheriff "who tries the case, to make any note or record of the evidence; "but where there are standing unrepealed clauses of an Act of "Parliament, specially applicable to the prosecution in hand, "requiring a note of the evidence to be taken, these clauses "remain perfectly entire, notwithstanding the enactment of the "16th section of the Summary Procedure Act." But the Court held that as the accused had failed to require the Sheriff to take a note of the evidence, he was thereby deprived of the advantage of having an appeal on the merits.

SECTION 16 Form of Record. When must a Note of the Evidence be taken and preserved?

This important case seems to decide—(1), that this section does not *extend the jurisdiction* of the inferior Judge, although it excludes review on the merits, in so far as regards cases to which no particular enactment applies; and (2), that it is competent to bring under this Act a complaint for contravention of a statute which directs or authorises a note of evidence to be taken if summary trial is otherwise competent; but that the declaration in this section does not affect such cases.

(4.) Where the special statute does not authorise or direct a note of the evidence to be taken, the provisions of this section receive effect.—*Anderson & Holms* v. *Cooper*, H. C., March 7, 1868, 1 Couper, 18, and 6 Macph. 560. This was a suspension of a conviction under the Poaching Prevention Act, 25 and 26 Vict., cap. 114, which contains no provision for review, or for a note of the evidence being preserved. Lord Cowan observes (1 Couper, p. 24), "Unless there is in the statute a special provision providing "for such a note of appeal being taken, with a view to an appeal "to a higher Court, the provision of section 16 of the Summary "Procedure Act will apply."

Anderson & Holms v *Cooper.*

[2] This clause, as it stood in the Bill, contained a provision that the Judge should, if required, take a note of—(1), Any offer of proof made by either of the parties and refused to be admitted; (2), Any objection to the admissibility of evidence sustained or repelled; and (3), Any objection to the relevancy or competency of the charge or proceedings to which he might not have thought proper to give effect by amendment of the complaint in the manner provided in section 5. But this part of the clause was struck out, and until lately it was not necessary for the Judge to note any of these matters, though he was not precluded from noting them if he thought fit.—*Owens* v. *Calderwood*, *supra*, per Lord Justice-General (Inglis). But by section 6 of the Summary Prosecutions Appeals (Scotland) Act, 1875, it is provided that "In order to an "appeal under this Act, it shall be competent for any party to a "cause to require the Sheriff, or Sheriff-Substitute where the cause "depends before him, or the Clerk of the Court where the cause "depends before any other inferior Judge, to take and preserve a

What the Record must contain.

SECTION 16 Form of Record.

"note of any objections to the admissibility of evidence sustained "or repelled by such Sheriff, Sheriff-Substitute, or other inferior "Judge." The word "'cause' means and includes every proceed-"ing which may be brought under the Summary Procedure Act, "1864, and every other summary proceeding for the prosecution "of an offence or recovery of a penalty competent to be taken "before an inferior Judge."—*Ibid.*, section 2.

Proceedings may be either in Writing or Printed

17. The several Forms of Proceeding prescribed by this Act may be either in Writing or printed, or may be partly written and partly printed; and all such Forms as bear reference to any antecedent Form may be either on the same Sheet of Paper therewith, or on a separate Sheet attached to it.

Application of Forms of Conviction, &c.

18. In cases of Conviction or Judgment against the Respondent in Prosecutions and Proceedings under this Act, the Sentence of the Court may be in one or other of the Forms contained in the Schedule (K) to this Act annexed, or as nearly as may be in such Form, according to the Nature and Circumstances of the Complaint,[1] viz.:

(1.) In Complaints for Offences at Common Law, punishable on summary Conviction, the Sentence of the Court shall be in the Form No. 1 in the said Schedule:

(2.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable on summary Conviction to be imprisoned, or to be imprisoned or fined in the Discretion of the Court, the Sentence of the Court awarding Imprisonment shall be in the Form No. 2 in the said Schedule; or if the Sentence is for a Fine, then in such of the subsequent Forms as may be in accordance with the Provisions of the Act of Parliament:

(3.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to forfeit a Penalty, and in default of Payment thereof to be im-

prisoned for a Period limited to a certain Time, at the Expiration of which he shall be entitled to Liberation although the Penalty has not been paid,[2] the Judgment of the Court shall be in the Form No. 3 in the said Schedule:

SECTION 18 Form of Conviction, &c.

(4.) In complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, which, under the Authority of the Act, may be recovered by Poinding or Distress and Sale, or other summary Process of Execution by Sale, and, in default of Payment or Recovery of the Penalty, by such Process of Execution,[3] the Accused is or shall be liable to be imprisoned for a Period limited as aforesaid, the Judgment and Warrant shall be in the Form No. 4 in the said Schedule:

(5.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, which, under the Authority of the Act, may be recovered by Poinding or Distress and Sale, or other summary Process of Execution by Sale, and where the Act also authorizes the Imprisonment of the Accused for a Period limited as aforesaid,[4] then, unless Imprisonment be only authorized[5] in default of Recovery by such Process of Execution, the Judgment of the Court may be in either of the Forms No. 4 or No. 5 in the said Schedule:

(6.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, and where no special Provision is made for the Recovery thereof, or for the Substitution of a Term of Imprisonment in default of Payment, and also in all Cases where, under the Authority of any Act of Parliament, such

SECTION 18
Form of Conviction, &c.

Penalty is or shall be recoverable by Action, Civil Process, or Diligence, the Judgment of the Court shall authorize Execution by Arrestment, Poinding and Sale, and Imprisonment[6] (unless Recovery by Imprisonment is excluded by the Terms of the Act),[7] and may be in the Form No. 6 in the said Schedule; and the Warrant of Imprisonment to be granted in pursuance of any such Judgment may be in the said Form No. 6, and shall authorise the Detention of the Respondent until liberated in due Course of Law;[8] and in all cases where, under the Authority of any Act of Parliament, such Penalty is or shall be declared to be recoverable by Arrestment, Poinding, or Distress and Sale, or Imprisonment, or by any Combination of those Forms of Diligence other than as above provided for, the Judgment of the Court may be expressed in the said Form No. 6, so far as applicable; and no Warrant of Imprisonment shall be issued upon a Judgment in such Form until after the Period allowed for Execution by Arrestment or Poinding, except in the event mentioned in the said Form No. 6.[9]

(7.) In Complaints for the Contravention of any Act of Parliament by which the Court is or shall be authorized to ordain the Person contravening to do or perform any Act other than the Payment of Money, and where, in consequence of failing or neglecting to do or perform such Act, such Person shall be liable to be imprisoned for a Term to be specified in the Warrant of Imprisonment, the Judgment and Warrant may be in the Form No. 7 in the said Schedule; and such Judgment and Warrant may, if the Act of Parliament so require, be used in combination with a Judgment or Warrant in one or

other of the Forms herein-before specified, and may, if the Act so require, be combined with a Judgment for Expenses, and Warrant for Recovery thereof, and for Imprisonment in default of Payment, in such Form as may be requisite. SECTION 18 Form of Conviction, &c.

(8). Any Judgment of Absolvitor to be pronounced in any Complaint or Proceedings under this Act may be in the Form No. 8 in the said Schedule:

Provided that the Court may add to any of the Forms of Conviction or Judgment for any Penalty such Finding of Expenses and Warrant for the Recovery thereof, and such other Finding or Declaration as may be required by the Act of Parliament founded on; and, if so required, the Court may add to any Warrant of Imprisonment contained in such Conviction or Judgment, or consequent thereon, a Direction that the Respondent shall be kept to Hard Labour during the whole or part of the Term of his Imprisonment; and Execution upon any Judgment or Warrant may proceed upon such Judgment or Warrant itself, or upon an Extract issued and signed by the Clerk of Court, which Extract may be in the Form No. 9 of Schedule (K), or as near as may be thereto.

[1] The forms provided in Schedule K are directory, not imperative. This was expressly decided in the cases of *Kinnear and Brymer* v. *White*, H. C., May 25, 1868, 1 Couper, 56, and 6 Macph. 804, and *Scott* v. *Cumming*, H. C., July 7, 1866, 5 Irv. 278; and, indeed, appears from the words of the section and schedule, "as nearly as may be according to the nature and circumstances of the complaint," "in so far as applicable," &c. Therefore "such alterations as are necessary to render the form "applicable to the special circumstances of the case may be made; "and, indeed, in all cases, if the form is substantially pursued, "or if equivalent language be used, it is no objection that it has "not been followed *verbatim*."—Paley on Convictions, 5th ed., p. 170. As to the general question when statutory forms are to be held directory, and when imperative, see Dwarris on Statutes, p. 610, and cases collected in Paley, 55, Note (n). Forms directory, not imperative.

[2] Section 21 of 9 Geo. IV., cap. 29, enacts "that all warrants of "imprisonment for payment of penalty, or for finding of caution,

SECTION 18 Subdivision (3). Imprisonment for a specified period.

"shall specify a period at the expiry of which the person sentenced shall be discharged, notwithstanding such penalty shall not have been paid or caution found." But that enactment applies only to proper criminal offences.—See section 19 of 9 Geo. IV., cap. 29. The imprisonment for a period limited to a certain time here mentioned is that authorised by or competent under the special statute, whether the offence be purely criminal or not.

Subdivision (4). Instant execution by imprisonment when competent.

[3] If the Judge considers it "inexpedient" to issue a warrant of poinding and sale, or of arrestment, poinding and sale, he may ordain instant execution by imprisonment, and grant warrant to imprison the respondent for a specified period.—See form at the end of No. 6, Schedule (K), and section 19. Immediate imprisonment is competent, although the special statute only directs imprisonment on default of recovery by execution.—*M'Donell and M'Leod* v. *Davidson*, H. C., March 7, 1868, 1 Couper, 9. But it is only competent where the Act founded on authorises imprisonment *for a specified period.*—See section 19, and declaration appended to the form at the end of No. 6, Schedule (K). It thus appears not to be competent to ordain immediate imprisonment where the proper warrant of imprisonment authorises detention "until liberated in due course of law."—See notes 7 and 8 to this section.

In the forms appended to the English Act the word "inexpedient" is thus interpreted:—"Where the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress."—11 and 12 Vict., cap. 43, Schedules I 1, I 3, &c., and Fraser on "Master and Servant," 2d ed. 755. Another reason for this provision may be to prevent the escape of the respondent; per Lord Ardmillan in *M'Donell and M'Leod* v. *Davidson, supra.*

Subdivision (5). "Unless imprisonment be only *authorised*," &c.

[4] That is, imprisonment for a specified period, either immediate, or in default of recovery by execution.

[5] This must be read as meaning, "unless the Act expressly declares that imprisonment shall only be competent in default of recovery by such process of execution." In *M'Donell and M'Leod* v. *Davidson, supra*, the Sheriff or Justice was empowered by section 9 of 9 Geo. IV., cap. 39, "to grant warrant for the recovery of all penalties and expenses decerned for, *failing payment within fourteen days after conviction*, by poinding and imprisonment not exceeding a period of six months;" but the Court held that it was competent, in terms of section 19 and No. 6 of Schedule (K) of this Act, to award immediate imprisonment in default of payment of the penalty. Section 19 of this Act expressly authorises the Judge to issue a warrant for immediate imprisonment, where "the respondent is also liable to be imprisoned for a term to be specified in the warrant of imprisonment, *either* immediately, *or*, in default of recovery of the penalty, by execution."

Subdivision (6).

[6] By 5 and 6 Will. IV., cap. 70, it is enacted that it shall not be lawful to imprison any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d., exclusive of interest

and expenses. But the 5th section of that Act provides "that nothing "in this Act contained shall affect obligations *ad facta præstanda*, "or the rights of His Majesty, or his Officers, or the Fiscals of "Courts of Law, or others, to imprison as formerly on account of "taxes or penalties due to the Revenue, or on account of any fines "or any forfeitures imposed or hereafter to be imposed by law, or "applied to imprisonment for Poor Rates or local taxation, or to "imprisonment for sums decerned for aliment." It was decided in the case of *Lawson* v. *Jopp*, 15 D. 392, Feb. 16, 1853, that a penalty and expenses decerned for in respect of a conviction of an offence under the Salmon Fisheries Act, 9 Geo. IV., cap. 39, which together did not amount to £8, 6s. 8d., were not *a civil debt* in the sense of the Act 5 and 6 Will. IV., cap. 70, and that the respondent might be incarcerated in terms of an interlocutor which granted warrant for his imprisonment for one calendar month from the date of commitment, failing payment of the said penalty and expenses within fourteen days. The Lord President (M'Neill) held that the Act did not apply to "pecuniary mulcts or fines imposed by way "of punishment for crimes or offences, though these may, in a "sense, be called debts, and although the party may be entitled to "be relieved from imprisonment upon payment" (p. 396). In that case the imprisonment imposed was for a specified period; but it is thought that, under the excepting clause, section 5 of 5 and 6 Will. IV., cap, 70, imprisonment until liberated in due course of law (where that is the appropriate sentence) is competent for the recovery of penalties sued for under the Summary Procedure Act, although not exceeding the sum of £8, 6s. 8d., where such penalties are not purely civil debts; although the offences in respect of which they are imposed may not be purely criminal, and even although the jurisdiction may not be criminal in the sense of section 28 of this Act.

SECTION 18 Subdivision (6). What are civil debts?

[7] In *Murray* v. *Jones*, H. C., June 17, 1872, 2 Couper, 284, two complaints were brought against the same person for recovery of penalties under sections 57 and 103 of 32 and 33 Vict., cap. 70 (Contagious Diseases Animals Act). That Act contains no special provisions for the recovery of penalties under those sections, and accordingly the cases fell under this (the 1st) branch of the 6th subsection of section 18. In one of the complaints the Justices in Quarter-Sessions, reversing a judgment of acquittal, ordained immediate imprisonment for one week in default of payment. In a suspension it was pleaded that immediate imprisonment was incompetent, in respect it was only where the Act "expressly authorised" imprisonment for a specified period (which 32 and 33 Vict., cap. 70, did not) that immediate imprisonment was competent under section 19, and the declaration at the end of No. 6 of Schedule (K). The High Court of Justiciary, in refusing the bill, held that the word "authorise" in the schedule must be read as meaning "do not exclude." The Lord Justice-Clerk (Moncreiff) observed (p. 294):—"I think that if sections 18 and 19, and "relative "schedule, of the Summary Procedure Act were read in the

"Authorise" held equivalent to "do not exclude."

SECTION 18 Subdivision (6). Immediate imprisonment, when competent.

"restrictive sense contended for on his behalf, there could arise "no case under section 18 and subsection 6 to which the form of "warrant for immediate imprisonment would apply. That might "possibly not be conclusive, but I rather think that section 19 "covers the whole matter, and that the enactment in that section "was intended to meet the case of prosecutions under the Summary "Procedure Act wherever the special Act does not exclude imprison-"ment." Without disputing the correctness of this definition of the word "authorise," the soundness of the judgment may be doubted. There being no provision for the recovery of penalties under the sections of the Act founded on, the only competent warrant of imprisonment, viz., that provided by the first half of subsection 6, was one authorising detention "until liberated in due "course of law."—See next note. The sentence pronounced being for a specified period, was thus *ultra vires* of the Justices. The question therefore to be decided was, not merely whether the word "authorise" was to be read as equivalent to "do not exclude," but whether immediate imprisonment for a specified period was competent, where not only was imprisonment not authorised by the special statute, but where the appropriate warrant under the Summary Procedure Act was a warrant of imprisonment until liberated in due course of law. This is not well brought out in the argument for the suspender, and the Court appear to have assumed that it was competent, under the complaint in question, to ordain imprisonment for a specified period, and that the only question before them was whether it was essential that the special statute should expressly authorise such imprisonment. It is thought, with submission, that, however expedient it might be that the Judge should have power to ordain immediate imprisonment in all cases where the special statute does not exclude it, the Summary Procedure Act has distinctly limited this power to cases (1), Where the special statute "authorises," or, say, "does not exclude" imprisonment for a specified period,—see subsections 4, 5 and 6 of section 18, taken in connection with Nos. 4, 5 and 6 of Schedule (K), and the form at end of No. 6 of Schedule (K); or (2), Where, in respect of conviction, the respondent is "liable" to be imprisoned for a specified period (section 19), although perhaps the special statute may not expressly say so; as where the statute merely authorises imprisonment, but it can be gathered from the character of the offence or the language used that imprisonment in *modum pœnæ* is intended.

Imprisonment "until liberated in due course of law."

[8] The expression "until liberated in due course of law" is used in distinction to "for a period limited to a certain time," and "for a "specified period;" and means until liberated by payment, *cessio*, discharge under the Bankrupt Statutes, or other mode by which a civil debtor can obtain liberation. The warrant of imprisonment here authorised is a warrant in execution, and not *in modum pœnæ*. It is declared to be the appropriate warrant in all cases falling under the preceding part of subsection 6. These are (1), Where no special provision is made in the statute founded on for recovery of penalties, or for the substitution of a term of imprisonment in default of

payment; and (2), Where such penalties are recoverable under the statute by action, civil process, or diligence. It would appear that the purpose and effect of these provisions is to make such cases civil *quoad* review in the sense of section 28; the imprisonment authorised not being part of the punishment, but in execution. The question was purely raised in the case of *Morrison and Black* v. *Welch*, Perth, Sep. 1872, not reported. This was an appeal by the joint Procurators-Fiscal of Fife at Cupar against a judgment of the Sheriff, dismissing a complaint at their instance brought under the Summary Procedure Act for recovery of penalties under the Contagious Diseases (Animals) Act, 1869. The section of the latter Act founded on (section 103), does not contain any provisions for the recovery of the penalties thereby imposed. The Sheriff having dismissed the complaint on the ground of irrelevancy, the complainers appealed to the Circuit Court. On the case being called, the respondent objected that appeal to the Court of Justiciary was incompetent, in respect the proceedings were civil *quoad* review. With reference to the definition of civil and criminal jurisdiction in section 28 of the Summary Procedure Act, he maintained that the imprisonment there mentioned as the test of criminal jurisdiction was imprisonment for a limited period, imposed, not in execution, but as forming the whole or part of the punishment for the contravention or offence, and whether ordained to take place immediately, or in default of payment or recovery by execution. And he pointed out that if a conviction had followed on the complaint in question, the appropriate warrant was a warrant, under this subsection, of imprisonment until liberated in due course of law; such warrant being directed to be used by subsection 6 in all cases where no special provision was made by the Act founded on for the recovery of penalties, and section 103 of the Contagious Diseases (Animals) Act not containing any such provisions. The presiding Judge, Lord Neaves, in respect of the importance of the question, certified the case to the High Court of Justiciary, but it was not proceeded with. The respondent's objection seems unanswerable.

SECTION 18 Subdivision (6). Imprisonment "until liberated in due course of law."

[9] That is, where the Act founded on authorises imprisonment for a specified period.—See declaration at end of No. 6 of Schedule (K). This proviso applies only to the latter half of this subsection.—See note 7.

19. In all cases instituted under this Act in which any Penalty[1] is or shall be recoverable by Poinding or Distress and Sale, Arrestment, or other summary Process of Execution, and in which the Respondent is also liable[2] to be imprisoned for a term to be specified in the Warrant of Imprisonment, either immediately or in default of Recovery of the Penalty by Execution, the Court, in lieu of granting Warrant for Recovery by Poinding

Imprisonment may be awarded instead of levying Execution by Poinding and Sale.

SECTION 19 and Sale, may issue a Warrant for the immediate Imprisonment of the Respondent for any Term not exceeding the Term specified in the Act of Parliament in one or other of the Forms appended to Nos. 4, 5 and 6 in Schedule (K)[3]; and no Sale shall be made in virtue of a Warrant granted under the Authority of this Act, unless the Goods are, at the appraised Value, sufficient to satisfy the sums decerned for, and the Expenses of the Poinding and Sale.

[1] This section authorises immediate imprisonment for the recovery of compensation under 30 and 31 Vict., cap. 141, The Master and Servant Act, 1867.—*Holland* v. *The Gauchalland Coal Co.*, H. C., Dec. 24, 1867, 5 Irv.. 561, and 6 Macph. 186. The Lord Justice-General (Inglis), p. 568, said, "Compensation was a "novelty first introduced by this Master and Servant Act, 1867, "and it may fairly be said that if the framers of the Act had had "that fact more clearly before them, this statute might have been "more perspicuously framed. . . . . When the 11th section of the Master and Servant Act refers to the Summary Procedure Act as furnishing a code of directions for putting orders "for payment of money into execution, I think we must hold it "applicable to the case of sums decerned for as compensation, as "well as for penalties or expenses."

[2] That is, liable under the Act founded on.—See notes 3, 5 and 7 to section 18. The term of imprisonment must not exceed the terms specified in the Act of Parliament.

[3] This section was held to warrant immediate imprisonment, even where the Act founded on allowed fourteen days for payment of penalties and expenses.—*M'Donell and M'Leod* v. *Davidson*, *supra*, second point, and note 3 to section 18.

Proceedings subsequent to Conviction.

20. Where, in consequence of the requirements of this Act or of any other Act of Parliament, it is necessary that any Warrant of Imprisonment or other Warrant should be granted subsequent to the Conviction or Judgment, or where any other ulterior proceeding is enjoined, the Forms and Directions respectively appended to the several Forms of Convictions and Judgments in Schedule (K) may be used and observed so far as the same are applicable, and all such Warrants or ulterior proceedings may be taken without the presence of the Respondent.

SECTION 21. Signature of One Justice sufficient, except to Conviction or Judgment

21. In cases in which under any Act of Parliament any matter or proceeding which may be dealt with under the Forms prescribed by this Act, or which is incidental thereto, is or shall be cognizable by Two or more Justices, it shall be sufficient that any Warrant of Imprisonment or other Warrant or Proceeding prior or subsequent to the Conviction or Judgment shall be subscribed by One Justice;[1] and it shall not be necessary that such Justice shall be or shall have been present at the Hearing of the Complaint, but the Conviction or Judgment shall in all cases be signed by such number of Justices present at the Hearing, and concurring in the result thereof, as may be required by such Act; and in case of an equal Division of Opinion[2] among the Justices present, the Complaint shall be held to be not proved, and Judgment shall be given for the Respondent;[3] and all Warrants of Citation in cases which may be dealt with under this Act may be signed by the Clerk of Court, without being laid before a Judge.

[1] In *Carruthers and Others* v. *Jones*, H. C., June 1, 1867, 5 Irv. 398, it was held that in a complaint for an offence against the Salmon Fisheries (Scotland) Act, 1862, by which Act two Justices are required for the trial of a case, it was competent for one Justice, without the presence or concurrence of others, to grant an adjournment before trial.

[2] On a concluded cause.—See next note.

[3] A party was tried before two Justices for a contravention of section 1 of 2 and 3 Will. IV., cap. 60, upon a complaint brought under the Summary Procedure Act. After trial the Justices minuted that they differed in opinion, but did not pronounce judgment for the respondent. The respondent was thereafter tried, convicted and sentenced upon a second complaint for the same offence. The sentence was suspended on the ground that the respondent had tholed an assize. Lord Neaves said, "The Summary "Procedure Act expressly provides in the 21st section for the "case of an equal division of opinion, and directs that where this "occurs the complaint shall be held to be not proved. . . . In "order to this no doubt the case must have come to a final conclu-"sion. There must be a verdict or a declaration of opinion. . . "But here it did come to a final issue, and if so, the com-"plainer ought not to lose the benefit of the statutory provision

SECTION 21 " by the Justices' failure to issue a formal judgment."—*Dorward* v. *Mackay*, H. C., Jan, 29, 1870, 1 Couper, 392,.

Court may award Expenses to or against private Complainer, although not prayed for.

22. In all cases of Complaint under this Act[1] for the recovery of any Penalty it shall be lawful for the Court to make an award of Expenses without the same being prayed for in such Complaint; but Expenses shall not be awarded to or against any public Prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest,[2] unless such award of Expenses is authorised by such Act:[3] Provided that in all cases where a Complaint for the recovery of a Penalty is at the instance of a private Complainer, it shall be lawful for the Court before which such Complaint is brought to award Expenses to the successful party if the Court shall think fit; and such Expenses may be recovered and imprisonment awarded, in default of payment or recovery thereof, in the manner and form specified in the said Schedule (K) in connection with the several forms of Convictions and Judgments therein contained, or, if necessary, by a separate Judgment for Expenses, in such form as may be appropriate.[4]

[1] It should be noted that the provisions of this section are confined to proceedings under the Summary Procedure Act. In all other cases the usual rules as to expenses will be applied.

[2] The Procurator-Fiscal, or other party prosecuting for the public interest, is thus put on the same footing as to expenses as the Lord Advocate. Previously, the Procurator-Fiscal might be found liable in expenses even in purely criminal cases (Hume, ii. 134, note 1, and Alison, ii. 93), although they were not usually awarded against him unless the proceedings had been grossly irregular or oppressive. When awarded, they were often followed by an action of damages.—Alison, ii. 94. But the rule introduced by this section is confined to expenses in the inferior Court. In an appeal or supension to the Court of Session or Court of Justiciary, it is competent to award expenses to or against a Procurator-Fiscal or other party prosecuting for the public interest.—*Nimmo* v. *Clark and Wilson*, Second Division, Feb. 22, 1872, and 10 Macph. 477 and 482.

[3] This was held to apply to proceedings following on a complaint brought by a Procurator-Fiscal under section 16 of 25 and 26 Vict., cap. 35 (Public Houses Acts Amendment (Scotland)

Act, 1862), which does not authorise an award of expenses; and a sentence which awarded expenses to the prosecutor in addition to a penalty was suspended—*Ross* v. *Stirling*, H. C., Oct, 22, 1869, 1 Couper, 336, and 8 Macph. 49; but it was observed from the Bench that it was not necessary, in order to entitle the Judge to award expenses, that the special Act should *expressly authorise* an award of expenses. The Lord Justice-General (Inglis) said (1 Couper, 342), "That leads us to the consideration of the terms of "the Public Houses Acts Amendment Act, the statute libelled, "to see whether it 'authorised' such an award. Now, I may say "that in considering its terms, I do not require to find an express "authority in the Act for an award of expenses for each particular "offence. If it be the fair meaning of the statute under which "the complaint is presented that the conviction is to be followed "by such an award, that, I think, is sufficient."

SECTION 22

Where the statute founded on authorised expenses to be given to the prosecutor on conviction, but was silent as to awarding expenses to the respondent on acquittal, it was decided that the statute must be held as authorising an award in the respondent's favour in the latter event; and accordingly the High Court remitted to the Sheriff to find the appellant, who had been acquitted in the inferior Court, entitled to expenses in the Sheriff-Court, and to decern for the amount thereof as taxed.—*Walker* v. *Bathgate*, June 4, 1873, 2 Couper, 460.

[4] The warrant of imprisonment to be granted in respect of default of payment or recovery of expenses will be of the same character as that appropriate to the offence or contravention, *i.e.*, either for a specified period, or until liberated in due course of law, as the case may be. In *Lawson* v. *Jopp*, 15 D. 398, where it was pleaded that the expenses awarded were a civil debt, even if the penalty could not be so regarded, Lord President M'Neill said, "I do not see any solid ground for drawing a distinction between "that part of the sum which consists of fine and that part which "consists of expenses. Both are statutory consequences of the "transgressions that are dealt with by the statute in the same "manner as regards the imprisonment and its limitation."

Warrant of Imprisonment may be framed so as to take effect from the Expiration of a previous Sentence.

23. If, upon any complaint presented under the authority of this Act, a warrant shall be issued for the imprisonment of the Respondent pursuant to a Conviction or Judgment, and such Respondent shall then be in prison undergoing imprisonment for a specified period, upon a Conviction for any Offence, or for default in payment of any Penalty or Expenses, or for disobedience to any order of Court, the Warrant of Imprisonment upon such subsequent Conviction or Judgment shall be delivered to the

SECTION 23 Limitation of Time for bringing Complaints.

Keeper of the Prison to whom the same shall be directed; and it shall be lawful for the Court granting the same, if it shall think fit, to insert an Order therein to the effect that the imprisonment upon such subsequent Conviction or Judgment shall commence at the expiration of the imprisonment to which such Respondent shall have been previously sentenced or adjudged.

24. In all cases in which no time is already or shall be hereafter specially limited for instituting any Complaint for the recovery of any Penalty or sum of money, or for Conviction for any statutory offence punishable on summary Conviction, in the Act of Parliament relating to each particular case, such Complaint shall be instituted within six months from the time when the matter of such Complaint arose.[1]

[1] This limitation is not confined to cases under the Summary Procedure Act. It was applied to a complaint brought under 4 Geo. IV., cap. 34 (which contains no special limitation as to time), after the expiry of six months from the time when the matter of complaint arose.—*Laidlaw* v. *Sharkey*, H. C., Nov. 26, 1866, 5 Irv. 343.

Act not to extend to certain Warrants and Proceedings.

25. Nothing in this Act shall extend, or be construed to extend, to any Warrant or Order for the removal of any poor Person who is or shall become chargeable to any Parish or District, nor to any Information or Complaint or other Proceeding under or by virtue of any of the Statutes relating to Her Majesty's Revenue, or under or by virtue of any statutory Provision for the recovery of any Rate, Tax, or Impost whatsoever.

Where special Jurisdiction conferred on Police Court, Forms of this Act may be used.

26. In cases in which, under the authority of any Act of Parliament, any Conviction may be obtained, or any Warrant *ad factum præstandum* or Judgment granted or pronounced, or any Penalty or Expenses recovered, by way of summary Complaint before any Sheriff, Justices or Justice, or Magistrate, and it is also provided therein, or in

any other Act of Parliament having reference thereto, that such Conviction or Warrant may be obtained, or Judgment pronounced, or Penalty or Expenses recovered, in any Police Court in *Scotland*, the proceedings by this Act authorised may be taken in such Police Court with such and the like remedies by Poinding and Sale, Imprisonment, or otherwise, as are herein provided in the case of Convictions and Judgments obtained before Sheriffs, Magistrates, and Justices of the Peace; and the several forms contained in the Schedules to this Act annexed may be varied so far as may be necessary to render them applicable to such Police Courts. SECTION 26

Jurisdiction of inferior Courts not to be extended.

27. Nothing in this Act contained shall confer, or be construed to confer, upon any Sheriff, Justices or Justice, or Magistrate acting under the authority of this Act, any other or more extensive Jurisdiction in relation to any matter which may be made the subject of Complaint than is or shall be vested in such Sheriff, Justices or Justice, or Magistrate at Common Law, or under any Act of Parliament empowering them, or any of them, to take cognisance of such matter of Complaint;[1] nor shall anything in this Act contained affect any right to sue by way of ordinary Action in the Court of Session or Sheriff Court in *Scotland* for the recovery of any Penalty or Forfeiture, save and except as to the right of suing for such Penalty or Forfeiture in the Sheriff Small Debt Court in the form provided in the fourth-recited Act.[2]

[1] The scope of this section has already been considered in discussing the cases of *Bute and Spouse* v. *More*, and *Halliday* v. *Bathgate, supra;* see note 4 to section 3, and note 2 to section 16. But while no wider *jurisdiction* is conferred, the alterations in procedure noticed above give indirectly some important powers which inferior Judges do not possess at common law or under previous statutes; such as the power of dispensing with a note of evidence, and the power of granting warrant for immediate imprisonment in certain cases, instead of first granting a warrant for execution by poinding and sale, &c. See notes to sections 16 and 18.

SECTION 27

[2] From this it appears that the provisions of this Act for the recovery of statutory penalties are intended to supersede those of the Small Debt Act, 1837.

Limits of Civil and Criminal Jurisdiction defined in respect to Proceedings by way of summary Complaint

28. And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament authorising Convictions for Offences, and the recovery of Penalties, and the enforcement of orders by imprisonment upon summary Complaint before Sheriffs, Justices, and Magistrates in *Scotland*,[1] and it is expedient to define the cases in which such Jurisdiction shall be held to be of a criminal nature: In all proceedings by way of Complaint instituted in *Scotland*, in virtue of any such Statutes as are herein-before mentioned,[2] the Jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a Conviction or Judgment upon such Complaint, or as part of such Conviction or Judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment[3] against the Respondent, or shall be authorised or required, in case of default of payment or recovery of a Penalty or Expenses, or in case of disobedience to their order, to grant Warrant for the imprisonment of the Respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation;[4] and in all other proceedings instituted by way of Complaint under the authority of any Act of Parliament, the Jurisdiction shall be held to be civil: Provided always that nothing contained in this Act shall be construed to affect the right of any party to proceedings taken under this Act to be examined as a Witness therein, but such right shall remain as it would have been if this Act had not passed.[5]

[1] The definition here made ("which had been frequently "recognised as a test" before the passing of the Act—per Lord

Justice-Clerk Inglis in *Kershaw* v. *Mitchell and Co.*, H. C., March 16, 1872, 2 Couper, 212) is simply for the purpose of fixing the Court of review in summary prosecutions for statutory offences, and the recovery of statutory penalties, as to which the greatest uncertainty previously prevailed. The usual tests of civil and criminal jurisdiction were often rendered difficult of application by the language used, or mode of recovery enjoined, by the statute imposing the penalty or creating the offence. Questions frequently arose as to whether the offence charged was *malum in se* or *malum prohibitum*, and if the latter, whether the statute intended that it should be regarded as criminal. Of this uncertainty the case of *Campbell* v, *Young*, Feb. 24, 1835, 13 S. 535, affords a good example. That was a prosecution under the Hawkers Act, on which conviction and sentence followed. It was objected to the competency of a bill of suspension and liberation presented in the Bill Chamber of the Court of Session that the Court of Justiciary was the proper Court of review. It was pleaded that the proceedings were criminal in the following respects:—That, in case of non-payment of penalties, the Hawkers Act authorised not only poinding and sale, but also imprisonment, *limited to three months*, unless the penalties were sooner paid; and that the matter charged was termed "an offence" of which the respondent was to be "convicted." For the suspender it was urged that the offence was not *malum in se*, and that the concurrence of the Procurator-Fiscal was not required; that the penalty was purely pecuniary; that poinding and sale was a civil diligence; and that imprisonment was authorised merely to secure the effect of the diligence and recovery of the money.

SECTION 28

The jurisdiction of the Court of Session was sustained, the elements of a civil character being held to predominate.—See opinion of Lord Moncreiff, p. 541. But such a case would be held to be criminal under this section, the Court being authorised under the Hawkers Act, in default of payment, to grant warrant of imprisonment for a period limited to a certain time, at the expiration of which the respondent is entitled to liberation.

The case of *Park* v. *Lord Stair*, Jan. 12, 1852, J. Shaw, 532, was much to the same effect. It was a prosecution under the Solway Fishery Act, 44 Geo. III., cap. xlv. Under that Act the Magistrate had power, failing immediate payment of the penalties, to impose sentence of imprisonment *for a specified period*, and in the case in question had imposed a sentence of three months, unless the penalty imposed should be sooner paid. But, on the other hand, the concourse of the Procurator-Fiscal was not required, and the case might be established by the oath of the party. A bill of suspension of the aforesaid sentence was refused as incompetent by the Court of Justiciary, the jurisdiction being held not to be of a criminal nature.—See also *Crosbie* v. *M'Minn*, H. C., Jan. 3, 1865, 5 Irv. 10, and *M'Donald* v. *Dobbie*, Jan. 14, 1864, 2 Macph. 407.

[2] That is, those mentioned in the beginning of the section.—

SECTION 28 *Forbes* v. *Adair*, Dec. 16, 1871, 10 Macph. 244, per Lord President Inglis, p. 246.

What cases are criminal, and what civil.

[3] Imprisonment for a limited period as part or the whole of the punishment, as distinguished from imprisonment in execution, and until liberated in due course of law.—See note 8 to section 18.

[4] This definition applies to the cases falling under subdivisions 2, 3, 4, 5 and 7 of section 18, and to some of the cases falling under the later half of subdivision 6. It does not apply to cases falling under the first half of subdivision 6 of section 18, as the only sentence of imprisonment there authorised is, "until liberated "in due course of law."

The case of *Forbes* v. *Adair*, *supra*, was a prosecution under the Medical Act, 1858, 21 and 22 Vict., cap. 90, sec. 41. Under this section it is provided that the Magistrate, failing payment of penalty and expenses, shall "grant warrant for recovery thereof "*by poinding and imprisonment*, such imprisonment to be for such "period as the discretion of the Sheriff or Justices may direct, "not exceeding three calendar months, and to cease on payment of "the penalty and expenses." The Sheriff having dismissed the petition with expenses, the complainer appealed to the First Division of the Court of Session. The respondents objected to the competency of the appeal on the ground that the Court of Justiciary was the proper Court of review, the proceedings being of a criminal nature, as defined by the 28th section of the Summary Procedure Act, 1864. The appellant argued that the case did not fall within the said definition, because the penalty might be recovered, in default of payment, by civil diligence, viz., poinding, as well as by imprisonment for a limited period. The Court held the proceedings to be of a criminal nature, being of opinion that they were made so, in the sense of this section, by power being given to the Magistrate to impose a sentence of imprisonment for a limited period, and that they did not cease to be criminal because the Magistrate was also empowered to grant warrant for poinding the goods of the convicted person, although there might be some anomaly in the circumstance that the criminal Court had to be resorted to in a suspension of civil diligence. Lord Deas said (p. 247), after quoting a portion of section 28, "I do not see that "it can be taken out of one or other of these categories, simply "because poinding as well as imprisonment is ordered. The "authority to imprison is granted either as part or as the whole of "the punishment; and if nice distinctions were to be taken because "something else is included in the sentence besides imprisonment, "the effect would be, in place of diminishing the uncertainty "which that section of the Summary Procedure Act was intended "to remove, to render the subject more perplexing than ever." The appeal was accordingly dismissed as incompetent.

Right of party to be ex-

[5] The purpose of this section being merely to indicate the Court of review, the character of the offences charged is not altered so as to give those cases a criminal character which were not formerly criminal,—to the effect, for instance, of rendering the concourse

of the Procurator-Fiscal necessary, or excluding the evidence of the parties, &c.—See *Kennedy* v. *Cadenhead*, H. C., Nov. 25, and Dec. 24, 1867, 5 Irv. 539. On the other hand, a case will be held to be criminal *quoad* review if it falls within the definition here given, although there may be peculiarities in the procedure enjoined which would otherwise have pointed to its being civil; as where recovery by civil diligence is authorised as part of the sentence—*Forbes* v. *Adair*, *supra*; or where the mode of proof allowed or enjoined is of a character not competent in proper criminal procedings. In *Park* v. *Lord Stair*, *supra*, the oath of the party was declared sufficient for conviction; but as, in that case, a sentence of imprisonment for a limited period was authorised in default of payment, it would probably now be held to be criminal. In short, the sole test is the sentence which may competently be pronounced. If it may include a warrant of imprisonment *in modum pœnæ* for a limited period, either immediate or in default of payment, the proceedings are criminal; if not, they are civil.

SECTION 28 amined as a witness not affected.

29. Where by any Act of Parliament a Power is or shall be given to any Sheriff, Justices or Justice, or Magistrate in the Exercise of Jurisdiction as a Judge of Police, to take cognisance of Offences punishable by Fine or Imprisonment, without any Declaration being expressed or implied of the Powers of such Judge of Police in relation to the Punishment of such Offences, it shall be lawful for such Sheriff, Justices or Justice, or Magistrate convicting for an Offence of which he or they may lawfully take cognisance, to sentence the Person convicted to pay a Penalty not exceeding Five Pounds, or, in the Discretion of the Judge, to sentence him to be imprisoned for any Period not exceeding Sixty Days from the Date of Imprisonment, and also to adjudge him to find Caution to keep the Peace for Six Months under a further Penalty of Ten Pounds, and in default of such Caution being found, to be Imprisoned for a further Period not exceeding Thirty Days.

Sentence of Police Judges not to exceed a Fine of £5 or Sixty Days Imprisonment in Cases where their Powers are not defined by Statute.

30. No Procurator-Fiscal or other Party prosecuting for the Public Interest by Complaint, under the provisions of this or any other Act,[1] shall be liable to pay or be found liable by any Court in a greater Sum than Five Pounds as Damages for or

As to Actions of Damages against Public Prosecutors.

SECTION 30 As to Actions of Damages against Public Prosecutors.

in respect of any Proceedings taken or anything done on such Complaint, or on any Judgment following on such Complaint, unless the Person prosecuting for Damages shall aver and prove that such Proceeding was taken or done maliciously and without probable cause;[2] but the Party suing such Damages shall not be entitled to have any Decreet or Verdict pronounced against such Procurator-Fiscal or other Party prosecuting, for any Damages, or Return or Repetition of Penalty or Costs, in case such Prosecutor shall prove at the Trial that the Party suing was guilty of the Offence in respect whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater or other Punishment than was assigned by Law to such Offence;[3] and any such Prosecutor sued as aforesaid may at any Time put an end to the Action, in so far as not founded on Acts done maliciously and without probable Cause, by tendering Payment of the Sum of Five Pounds as Damages, with the Amount of the Penalty, if recovered, and the Expenses of such Action to the Date of the Tender.[4]

[1] The provisions of this section are confined to prosecutions by *summary complaint* under this or other Procedure Acts, or under special statutes, and they do not, it is thought, apply to proceedings of a more serious nature. Accordingly, in *Bell* v. *Black and Morrison*, June 28, 1865, 3 Macph. 1026, and *Nelson* v. *Black and Morrison*, Jan. 26, 1866, 4 Macph. 328, mentioned in the next note, this section was not relied on by the defenders.

[2] Justices of the Peace are protected in a similar manner by "The Twopenny Act," 43 Geo. III., cap 141, secs. 1 and 2. This protection was extended by 9 Geo. IV., cap. 29, sec. 26, "to all "inferior Judges or Magistrates in Scotland in regard to any sen-"tence pronounced or proceeding had in any criminal trial;" and by 11 Geo. IV. and 1 Will. IV., cap. 37, sec. 13, to "all acts "done by any such Judge or Magistrate in apprehending any "party, or in regard to any criminal cause or proceeding, or to "any prosecution for a pecuniary penalty." In regard to actions of damages against Justices in England, see 11 and 12 Vict., cap. 44, sec. 13, and "Paley on Convictions," 5th ed., 480. The decisions pronounced in reference to these enactments may, with

advantage, be consulted in considering the operation of this section.

SECTION 30 When must malice and want of probable cause be averred and proved?

Its application is not so extensive as at first sight appears. If a Procurator-Fiscal or other prosecutor acts within the scope of his duty, and the procedure is legal and regular, the proceedings are privileged at common law, and he cannot be held liable in damages for an error in judgment or a mistaken view of the facts, unless malice and want of probable cause are proved.—*Arbuckle* v. *Taylor*, May 1, 1815, 3 Dow, 160. In such a case statutory protection is not required. If, again, he acts in a grossly illegal manner,—as by causing a person to be apprehended for an offence alleged to have been committed beyond the limits of his office (*M'Crone* v. *Sawers*, Feb. 10, 1835, 13 S. 443), or by causing a grossly illegal warrant to be executed (*Strachan* v. *Stoddart*, Nov. 13, 1828, 7 S. 4, and *Bell* v. *Black and Morrison*, June 28, 1865, 3 Macph. 1026), or by charging as a crime that which is palpably not a crime,—malice and want of probable cause need not be put in issue; and a protecting clause like this is unavailing, although in terms it applies, such cases not being "founded on acts done "maliciously and without probable cause."—See *Milhollan* v. *Bertram and Others*, Dec. 21, 1826, 5 S. 170; *Strachan* v. *Stoddart*, *supra*, and *Richardson* v. *Williamson*, June 1, 1832, 10 S. 607, which were actions of damages against Magistrates, in which "The Twopenny Act" was founded on in vain.

This clause must therefore be intended to apply to an intermediate class of cases, the limits of which cannot be very precisely defined,—viz. Where the prosecutor acts within the sphere of his duty, but makes mistakes in point of relevancy or form which, though sufficiently serious to lead to the complaint being dismissed or the conviction quashed, are not of a grossly illegal or irregular character; where, for instance, he prosecutes on a complaint which, after discussion at the trial or in the Court of review, is held to be irrelevant; or where he puts in execution a warrant which, though otherwise legal, labours under some technical defect; or where irregularities take place, or incompetent evidence is admitted during trial. Even in such cases, or at least in many of them, it would appear that a prosecutor is protected at common law. The case of *Mains* v. *MacLullich and Fraser*, July 9, 1861, 23 D. 1258, was an action of damages against joint Procurators-Fiscal, brought in respect of a conviction obtained against the pursuer, on a complaint containing two alternative charges under the Night Poaching Acts, which had been set aside on the grounds—(1), That one of the charges was irrelevant, in respect it did not charge the accused with "unlawfully" killing game; and (2), That the accused was convicted "of both charges," while the charges were alternative.—See 3 Irv. 533, Feb. 6, 1860. On the question whether malice and want of probable cause should be put in issue, Lord President M'Neill made the following valuable remarks (23 D. 1261):—"Mere failure of success on the part of the prosecution is "not of itself a ground of action; but there may be failure under

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"circumstances which make it pretty obvious that there was "malice and want of probable cause in raising the action; in which "case the party accused may have his action after acquittal, on "the ground of malice and want of probable cause.

"There is another class of cases where the libel may be held to "have been irrelevant, or thought to have been ambiguous. I "am not prepared to say that, where a libel is found irrele-"vant, it follows that the party who was accused—who was ap-"prehended on the charge and then accused, and put to trial—"is to have his action of damages merely because the libel was "found irrelevant. I do not think there is any reason for that. "There may, indeed, be such gross irrelevancy on the face of the libel "as should have deterred any man from stating the accusation, "and any Judge from proceeding on it;—such as, if there were no "statement about killing a hare at all, but only that A B on such "a day went along the high road. That might have spoken for "itself; and in such a case it may not be necessary to libel malice "and want of probable cause. But that is not the nature of this "case. It was a question of relevancy which the Court of review "were called on to decide. They did not sustain it, although the "inferior Court had done so; and it may sometimes be a very "difficult and nice question whether an indictment is relevant or "not. In this case, the judgment of the Court of review went on "the grammatical construction of the sentence. The word "'unlawful' was so placed that it covered only the immediate "sequence and not the whole charge; and so things were averred "which were held to be irrelevant; but in regard to part of the "charge the complaint was held relevant. The conviction also "was ambiguous, for it was a conviction on alternative charges. "But that was the conviction of the Justices who pronounced "sentence upon it.

"I think that a Procurator-Fiscal proceeding in regular course "is entitled to have such protection as to have it put on the pur-"suer to prove malice and want of probable cause. The statute "puts a duty upon the Procurator-Fiscal. In Scotland it is the "Procurator-Fiscal of Court who is required to institute a pro-"secution; and in this case this prosecution does proceed at his "instance for the public interest. Therefore I think he is entitled "to that protection of having malice and want of probable cause "inserted in the issue. There is no palpable irregularity in the "proceedings so far as he is concerned." These views were fully indorsed in two recent cases—*Rae* v. *Linton and the Bank of Scotland*, and *Craig* v. *Peebles*, hereinafter noted (note 4).

Bell v. *Black and Morrison.*

On this subject, however, judicial opinion has not been uniform. In *Bell* v. *Black and Morrison*, where the matter complained of was the execution of an illegal search warrant, the learned Judges seem to have been of opinion that where the warrant or other writ complained of is illegal (whether grossly so or not), the rule as to the necessity of proving malice and want of probable cause has no application. Lord Benholme said (3 Macph. 1030), "When a Judge grants a

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"warrant which is *ultra vires*, and that warrant is acted on by a "Procurator-Fiscal, the fiscal must be liable, whether malice and "want of probable cause be averred or not. The presence of these "elements may aggravate his liability, but are not necessary to it. "Indeed the only hesitation one has is just this, that cases may "be figured in which it might be a question of difficulty to say "whether the warrant was or was not illegal, and in such a case "it might be thought hard that a public officer should be held "liable if he acted in *bona fide*. But the importance of having a "fixed rule must prevent such considerations from influencing our "minds. If the public officer here had any such excuse he will "have the benefit of it before the jury. Still it remains that the "act was illegal. The warrant, which was bad and illegal, was "acted on. And though it may prove hard sometimes on a public "officer, the line of distinction ought to be preserved. It must be "left to the jury to soften the consequences, if it appears that the "conduct of the officer was such as indicated nothing more than "rashness. On that ground, and considering that we are not now "so much deciding a peculiar case as defining a class, the rule "must be adhered to. In reference to the present case, its circum-"stances suggest no difficulty. My only doubt was in laying "down a general rule, which in particular cases might press hard "on public officers. This is a flagrant case, but it has to be "decided on grounds which would include many cases where "no such recklessness appeared." And the Lord Justice-Clerk (Inglis) expressed himself to the same effect (p. 1029), "It "is enough, however, for the case to say that it (*i.e.* the "warrant) is incompetent, in respect that the Judge grant-"ing it had no power to do so. Whenever this is the case "the party putting such a warrant into execution is liable "for the consequences. In this a Procurator-Fiscal is no more "privileged than any private person; and, therefore, to require an "allegation of malice and want of probable cause is against all "principle and all authority. What the defender means by "requiring want of probable cause to be inserted I do not under-"stand, and although I asked the question I got no answer. The "words have no meaning in a case of this sort. There can be no "probable cause for the execution of an illegal warrant . . . "There is a class of cases where a Procurator-Fiscal is protected,— "I mean when he prosecutes an offender, *ad vindictam publicam*, "for a criminal offence, and where the prosecution fails on the "merits, and it turns out that the offender is innocent. No "action of damages will lie against him for that, unless it be "averred that he acted maliciously and without probable cause. "But does the position of a Procurator-Fiscal in this case differ "from that of a private person? I think not. There is a protec-"tion given by law to every one prosecuting criminal offences. "The prosecutor may be pursuing for his own private satisfaction, "but he is none the less doing it for the advantage of the country, "and he is entitled to protection in discharge of this duty.

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"Whether there are any intermediate cases where a distinction may "be drawn between public prosecutors and private parties, is not for "me to say, but I see no distinction in principle. On the ground "that this was the use of an illegal warrant, I think there is no neces-"sity for any averment of malice or want of probable cause." There the warrant complained of was held to be grossly illegal; but the observations of the learned Judges were not confined to such a case.

Nelson v. *Black and Morrison.*

In *Nelson* v. *Black and Morrison*, Jan. 26, 1866, 4 Macph. 328, arising out of the same proceedings, Lord President (M'Neill) substantially adhered to the views which he stated in *Mains* v. *M'Lullich and Fraser*. He said (4 Macph. p. 330), "It is not disputed "that Procurators-Fiscal, who have certain duties to discharge in "reference to the ends of justice, are protected in the ordinary "discharge of these duties, unless it can be shewn that they acted "maliciously, and without probable cause.

"But it is said that in this case it is not necessary for the "pursuer to take this burden of proof upon him, because the "warrant which the defenders asked for and obtained was in itself "an illegal warrant, and being of that character was not a thing "which they, as Procurators-Fiscal, were entitled to ask; and so "it is argued that they had no privilege in making the statements "upon which they did ask it.

"That may lead to a question of great nicety, viz. how far a "Procurator-Fiscal puts himself outwith that protection which he "would otherwise have, by asking something which he is not "entitled to have; and that again may depend upon the nature "of the illegality involved in the demand. If it is out of all law "and reason that a man's repositories should be searched, that is "one form of illegality. If, on the other hand, the objection is "merely that the premises ought not to have been searched in this "particular form, that is another matter. The one relates to the "substance of the proceedings; the other to the want of formality "or the want of caution in carrying them out. In regard to "illegality of the first kind I think the pursuer would be entitled "to have an issue without malice and want of probable cause. "In regard to the other I am of a different opinion."

From the opinions delivered in *Bell* v. *Black and Morrison*, it appears that, in the opinion of some Judges of eminence, there exists a considerable class of cases, not involving a charge of gross negligence or illegality, in which at common law malice and want of probable cause need not be averred, yet in which substantial damages may be recovered. To this class the present section will apply. The defender may at any time put an end to such an action by tendering payment of £5 as damages, with the penalty, if recovered, and expenses to date of tender, unless the pursuer relevantly avers and offers to prove that the defender acted maliciously and without probable cause.

But on the whole matter it would seem that the main practical effect of this provision is to furnish the defender with the means of obtaining a settlement in doubtful cases, or compelling the pursuer

to take his line. The pursuer, if he desires substantial damages, must do one of two things: He must either relevantly aver and undertake to prove malice and want of probable cause, which is usually a very heavy burden; or he must make out that, in the circumstances condescended on, the defender is not entitled to the statutory protection; and this leads to two practical observations on this section. *First*, If the pursuer intends or thinks he may have occasion to rely on malice and want of probable cause, he should aver them in his original summons or condescendence. From the provision at the end of the section it seems to be implied that he should do so, in order that the defender may see how far the action is "founded on acts done maliciously and without probable cause," and it may be doubted whether the Court in their discretion would allow an amendment.—See *Dallas* v. *Mann*, June 14, 1853, 15 D. 746, and *Cameron* v. *Hamilton*, Feb. 1, 1856, 18 D. 423. *Secondly*, The pursuer may aver malice and want of probable cause, but object to put them in issue. In this event it would seem that, as the defender is entitled to put an end to the action *at any time*, except in so far as founded on acts done maliciously, &c., the pursuer, on a tender being made, must either accept it, or undertake proof of malice and want of probable cause, unless, of course, he can establish that the section does not apply; and that it would not be competent to leave the question of privilege to arise at the trial, as is done in some cases.—See *M'Bride* v. *Williams and Dalzell*, Jan. 28, 1869, 7 Macph. 427.

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[3] This provision is inserted to meet the case of the accused, though guilty, having been acquitted through want of evidence, or of the conviction being quashed on some technical ground. The defender will be entitled to a verdict if he proves (1) that the pursuer was guilty of the offence charged (and for this purpose he may lead all competent evidence, though not adduced at the former trial); and (2), that the punishment undergone by the pursuer was not greater or other than that assigned by law to such offence. —Compare section 13 of 11 and 12 Vict., cap. 44, as to actions of damages against Justices of the Peace in England.

No damages if party suing proved guilty, &c.

[4] This provision was founded on by the defenders in two recent cases. In the case of *Rae* v. *Linton and The Bank of Scotland*, March 20, 1875, 2 Rettie, 669, which was a case springing out of the suspension *Rae* v. *Linton*, noted *supra*, p. 79, the pursuer contended that he was not bound to insert malice and want of probable cause in the issues, on the ground that the proceedings were entirely illegal. The defender, founding on this section, tendered the statutory allowance of £5, which was not accepted. The Court held that, apart from the statute, malice and want of probable cause must enter the issues. The Lord Justice-Clerk (Moncreiff) said, "The line of demarcation between a proceeding entirely without warrant of law, and one in which the law has not been accurately carried out, is in some cases very subtle. But I have no doubt in this case. We have a private party laying an information before the competent authority, and

Prosecutor may put an end to action by tender. *Rae* v. *Linton and the Bank of Scotland.*

SECTION 30 Prosecutor may put an end to action by tender.

"that authority taking steps to have the complaint investigated. "Ultimately it is found that the complaint is not relevant, not "that it did not set forth what might be a crime, but that the acts "averred did not amount to the crime libelled. The question now "is, whether the defenders are liable without an averment of "malice and want of probable cause. I think this is just such a "case as requires proof of malice, even apart from the Act. A "public officer in the discharge of his duty, although an error has "been committed, cannot be made responsible without an allega-"tion of malice. The case of *Bell* v. *Black and Morrison*, 3 Macph. "1056, was very different. The ratio of that judgment was, that "the proceedings complained of had not even a colour of law. It "may turn out that the defenders knew things which ought to "have prevented them acting as they did, but in that case it will "be easy to prove malice. Malice and want of probable cause "must enter the issues."

Craig v. *Peebles.*

The still more recent case of *Craig* v. *Peebles*, Feb. 16, 1876, 3 Rettie, 441, arose out of similar circumstances. A Justice of Peace Court convicted a person who held a public house certificate, in respect of his continuing to sell drink within the licensed premises, eight days after they had been rendered uninhabitable by fire. The conviction was afterwards suspended by the Court of Justiciary, on the ground that the Justices had mistaken the law. (See *Craig* v. *Peebles*, June 16, 1875, 2 Rettie, Justiciary Cases, 30). This was an action of damages directed against the Fiscal by the person accused. The Fiscal, defender, founding on this section, tendered £5 and the expenses of the action down to the date of tender. The pursuer did not accept the tender, and averred that the proceedings against him were taken maliciously and without probable cause. The defender pleaded that the pursuer's statements were not relevant. This plea the Lord Ordinary (Young) sustained, holding that although the condescendence contained an averment that the defender's proceedings were taken maliciously and without probable cause, nothing capable of being characterised as malicious or without probable cause was imputed to the Fiscal. In the course of his opinion, the Lord Ordinary said, "The expression 'probable cause' "is not a happy one to use with respect to an opinion or judgment "on a question of law; but using it here to signify that the view "of the law which the Fiscal maintained, and the Justices upheld, "was not irrational, and was such as reasonable men in their posi-"tion (or indeed in any position), might excusably entertain and act "upon, I cannot hesitate to say that there was probable cause for "it. . . . I have only further to observe that section 30 of the "Summary Procedure Act is in my opinion inapplicable. It relates "only to the amount of damages recoverable in cases where malice "and want of probable cause are not, as here, essential to liability."

The pursuer reclaimed and pleaded—first, that where the Fiscal had acted without warrant, a pursuer was not obliged to put malice and want of probable cause in issue; and further, that there was

no instance of a pursuer being refused an issue, where he was willing to take an issue with the words, "maliciously and without "probable cause." The Court adhered, holding that, even assuming that the pursuer was willing to put these words in issue, he had made no sufficient allegation of want of probable cause. The Lord Justice-Clerk (Moncreiff) said (p. 445), "In the circum-"stances set forth by the present pursuer, it is clearly impossible "for him to prove want of probable cause. The question whether "there was probable cause for presenting the complaint was one "partly of law, upon the construction of the licencing statutes, "and partly of fact, partly also of legal inference from facts, on "which persons, whether skilled or not, might reasonably differ." The defender was accordingly assoilzied. SECTION 30

In both these cases, it will be observed, that it was held, in accordance with the views of the Lord President in *Mains* v. *MacLullich and Fraser*, that malice and want of probable cause were essential to the relevancy of the action. This section was therefore inapplicable, and the tender was unnecessary.

Provisions of 11 and 12 Vict., c. 43, not to be applicable to Proceedings in Scotland.

31. In Cases in which by any Act of Parliament the Provisions of an Act passed in the Eleventh and Twelfth Year of the Reign of Her present Majesty, intituled *An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions within* England *and* Wales *with respect to summary Convictions and Orders,* are or shall be made[1] applicable to Complaints or Informations under any such Act, the Provisions of the said Act of the Eleventh and Twelfth Year of Her Majesty's Reign shall not[2] be applicable to any Proceedings under such Act when instituted in *Scotland;* but the Provisions of this Act shall be applicable to all such Proceedings as may, under the Authority of any such Act, be instituted before any Sheriff, Justices, or Justice, or Magistrate in *Scotland.*[3]

[1] For instance, "The Poaching Prevention Act, 1862," 25 and 26 Vict., cap. 114, sec. 4, and "The Poisoned Grain Prohibition Act, 1863, 26 and 27 Vict., cap. 113, sec. 5.

[2] In such cases, the Act is imperative, not permissive.

[3] The substitution of the provisions of the Scotch for those of the English Summary Procedure Act does not affect the instance of a common informer authorised by the latter Act to sue for statutory penalties.—*Hamilton* v. *Girvan*, June 15, 1867, 5 Irv. 439.

Proceedings may be in

32. The Proceedings in any Action or Complaint for the Prosecution for Offences or Recovery of

SECTION 32 Forms prescribed by this or other Acts.

Penalties under any Act of Parliament may either be according to the Form prescribed by such Act, or any Act incorporated therewith, or according to the Form prescribed by this Act, or, where such Proceedings are before the Sheriff, according to the Forms prescribed by the first-recited Act.[1]

[1] 9 Geo. IV., cap. 29. Previously, where forms of procedure were prescribed by the special Act, their use was imperative, and the summary procedure under Sir William Rae's Act, and under 19 and 20 Vict., cap. 48, could not be used instead. The summary procedure under Sir William Rae's Act can now be so used in the Sheriff Court, to which sections 19 and 20 of that Act are confined; but the procedure under 19 and 20 Vict., cap. 48, cannot be substituted for procedure under the special Act in the Burgh and Justice of Peace Courts.

Court of Justiciary and Court of Session to have Power to pass Acts of Adjournal and Sederunt.

33. It shall be lawful for the High Court of Justiciary and for the Court of Session respectively from Time to Time to pass such Acts of Adjournal or Acts of Sederunt as may be necessary or proper for carrying into effect the Provisions of this Act, and in particular to regulate the Expenses of Proceedings in the inferior Courts under this Act, and the Fees payable to Clerks of Court.

Convictions and Warrants not to be quashed or held void for Want of Form.

34. No Conviction or Judgment in pursuance of this Act shall be quashed for Want of Form,[1] and no Warrant of Imprisonment or for Poinding and Sale, and no Extract of Judgment,[2] shall be held void by reason of any Defect of Form therein, provided it be therein mentioned, or may be inferred therefrom, that it is founded or has proceeded on a Conviction or Judgment, and there be a valid Conviction or Judgment to sustain the same.

[1] As to what constitutes want of form, see note 4 to section 5. By one of the bye-laws of a railway company, every passenger was required, under a penalty of forty shillings, to deliver up his ticket before leaving the company's premises, or else to pay the fare from the place whence the train originally started. In a prosecution by the railway company, with concurrence of the Procurator-Fiscal, founded on this bye-law, the Sheriff convicted the accused "of having failed to deliver up his ticket," but said nothing about his

having refused to pay the fare. On a suspension having been brought (on the ground that the sentence did not meet or deal with the contravention charged), the company pleaded that the objection went to want of form, and so fell under this section. The Court suspended the sentence, the Lord Justice-Clerk (Inglis) observing (5 Irv. 209), "I do not think this is a matter of form falling "under the 34th section of the Summary Procedure Act. I think "it is a matter of substance, because it may be that the Sheriff did "really think that failure to deliver up a ticket was an offence under "the bye-law in question."—*Craig* v. *The Great North of Scotland Railway Company*, H. C., Nov. 20, 1865, 5 Irv. 206. In *Carruthers and others* v. *Jones*, H. C., June 1, 1867, 5 Irv. 398, an objection that the conviction did not set forth the names of the Justices before whom it was obtained was repelled. Lord Cowan observed (p. 408) that the objection, being purely to want of form, was effectually met by this section; and that the names of the Justices were effectually supplied by their subscription of the conviction, with the designation J. P. after them. SECTION 34

[2] A form of extract is given in Schedule (K), No. 9. Execution may proceed either upon the judgment and warrant itself, or upon an extract in that form.

35. Every Action or Prosecution against any Sheriff, Judge, or Magistrate, or against any Clerk of Court, Procurator-Fiscal, or other Person, on account of anything done in any Case instituted under this Act,[1] shall be commenced within Two Months after the Cause of Action shall have arisen,[2] unless a shorter Period is fixed by the Special Act,[3] and not afterwards. Limitation of Actions.

[1] As to what are proceedings "instituted under this Act," see sections 3 and 4. It is sometimes difficult to determine whether the proceedings complained of have been so irregular as to deprive the defender of the statutory protection. The considerations and tests applied to this subject are substantially the same as those already discussed in regard to the necessity of proving malice and want of probable cause.—See section 30 and notes. In *Murray* v. *Allan*, Nov. 29, 1872, 11 Macph. 147, a complaint instituted under the Summary Procedure Act charged a contravention of the Day Trespass Act (which authorises a Justice of Peace to grant warrant for the apprehension of a person accused before service of the complaint, "if he shall have reason to suspect from information upon "oath that the party is likely to abscond"), and set forth that the two persons accused were found trespassing in search of game, and had refused to give their names or addresses. On a deposition on oath by one witness to the truth of these statements, a Justice of the Peace, before the complaint had been served, issued a warrant

SECTION 35 Limitation of actions.

for the apprehension of the accused, and they were accordingly apprehended. Five months thereafter one of the accused raised an action of damages for wrongous apprehension against the complainers' law agent and two officers of police, on the ground that the Justice was not entitled, under the Day Trespass Act, to issue the warrant of apprehension before the complaint was served, without having information on oath that the accused was likely to abscond.

The defenders having founded on this section as excluding the action, the pursuer contended that it was inapplicable, in respect the proceedings were not under but entirely contrary to the provisions of the Day Trespass Act. The Court held (reversing Lord Mure's judgment) that although the proceedings had been irregular, there had not been such a deviation from the statute as to deprive the defenders of the protection of this section, and dismissed the action. Lord President (Inglis) said (p. 151), "I assume that a "wrong had been committed; that is, that there was here a mis-"carriage of justice, for which the pursuer would have been "entitled to ask the verdict of a jury if the action had been "brought in time. One might fancy cases brought under the Act "where the wrong was of such a nature that the limiting clause of "the statute would not be held to apply at all. We have seen "cases where the complaint had so little connection with the Act "of Parliament that it would be a grievous wrong to apply the "limiting clause. If a man having obtained a warrant under the "Act proceeds illegally and by violence to apprehend the accused, "and brings him before a Justice, the Act will not apply at all. "People may go so absurdly and extravagantly wrong as to put "themselves beyond the protection of the statute; or if he proceed "to arrest and poind without any warrant, no one can doubt that "he had no protection under the Act. In order to plead the clause "of the statute the defender must show that he was apparently "acting within its provisions. It is not easy to draw the line, "but it is easy to describe extreme cases on either side. It is "easy to imagine how the slip of a pen might make the whole "proceeding null and void. The question is to which side of the "line this case belongs. I have not much difficulty in saying that "this case belongs to the latter class and not to the former." (P. 152) . . . "Can it be said here that the prosecutor has "gone so extravagantly wrong as to put himself beyond the limit-"ing clause of the statute?"

A party is not entitled to protection merely because he believed *bona fide* that he was acting within the statute founded on. There must be reasonable grounds for his belief.—*Cann* v. *Clipperton*, June 13, 1839, 10 Ad. and Ell. 582. Justice Williams said (p. 589), "Protecting clauses, like that before us, would be useless, "if it were necessary that the person claiming their benefit should "have acted quite rightly. The case to which they refer must lie "between a mere foolish imagination and a perfect observance of "the statute. Here the defendant might, with some reason, believe "that the facts were such as would entitle him to protection."

[2] As to the computation of the two months see *Ashley* v. *The Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708. There, under a statute (25 and 26 Vict., cap. 35, sec. 35 (Public Houses Amendment Act, 1862) requiring all actions arising from procedure under it to be commenced within two months after the cause of action had arisen), it was held that magistrates who were sued for damages on account of a decision pronounced on 15th April, were timeously cited by a summons executed on 15th June following.

[3] Where a period longer than two months is fixed by the special Act, the period specified in this section rules.—See *Murray* v. *Allan*, *supra*.

SECTION 35 Limitation of actions.

Secretary of State may issue Orders as to Police Buildings.

36. Whereas it is expedient that in Towns where there is no Prison it shall be competent to establish Places of Confinement for Prisoners undergoing short Sentences, without incurring the Expense of supporting a Local Prison: It shall be competent in any Town where there is no Prison, but where there are Police Cells, for One of Her Majesty's Secretaries of State to issue an Order declaring that such Cells or any Number of them, or that any other Premises in the Possession of the Administrators of the Police in such Town, shall be a legal Prison for the Detention of convicted Prisoners for any Period not exceeding Three Days; and such Order shall be issued in the manner and subject to the conditions set forth in the Provisions of "The Prisons (*Scotland*) Administration Act, 1860," in reference to Local Prisons, so far as the same are applicable to the Purposes of this Act.

Provisions as to Discipline, &c., in Prisons to apply to Convicted Prisoners in such Premises.

37. When any building, or part of a building, other than a Local Prison under the administration of a County Board, is or shall be a lawful place of detention for Prisoners under short sentences, whether under the powers conferred on the Secretary of State by this Act, or in virtue of any public local Act, the Administrators of Police having charge of the same, and all persons in their employment, shall, in respect to such buildings or part of a building, be subject to the rules for Prisons in Scotland, as authorized in the said Prisons Administration Act, and to all the provisions of the said

Act relating to the discipline and management of prisons, and the transmission of returns, as if such administrators were a County Board.

SCHEDULES referred to in this Act.

SCHEDULE (A).[1]

1. *Complaint for Offence at Common Law.*

UNDER THE SUMMARY PROCEDURE ACT, 1864.[2]

Unto the Honourable Her Majesty's Justices of the Peace for the County of [*or* Sheriff of the County of *or* Magistrates of the Burgh of *as the case may be*].

The Complaint of *A B*, Procurator-Fiscal of Court [*or other Party entitled*[3] *to prosecute with his Concurrence*]:

Humbly showeth,

That *J K* [*Designation*] has been guilty of the Crime of[4] Actor, or Art and Part, in so far as [*here state the Particulars of the Offence*]:[5]

May it therefore please your Honours [*or* Lordship] to grant Warrant to apprehend[6] the said *J K*, and bring him before you [*or* to cite[7] the said *J K* to appear before you] to answer to this Complaint, and thereafter to convict him of the said Crime, and to adjudge him to suffer the Pains of Law.[8]

According to Justice.

A B [*Signature of Public Prosecutor*[9] *or of Private Prosecutor, with Concurrence annexed.*]

[1] No material alteration is made by the Act as to the structure or requisites of a summary complaint; and, accordingly, the rules formerly recognised in the construction of such instruments apply to the forms here given. These forms are substantially the same

as those in Schedule C of Sir William Rae's Act. No notice need be given of documents or other articles of evidence to be produced, and no list of witnesses need be annexed.—Alison, ii. 48. The form is simple and not encumbered with technicalities, but it is the skeleton of a proper criminal charge, and must be correctly filled up in every essential particular.

SCHEDULE (A), No. 1. Complaint at common law.

[2] This heading, even if not essential, should always be prefixed. The consequences of bringing a complaint under the Summary Procedure Act are so serious that the accused is entitled to notice. "Where parties are acting under a limited statutory authority, "they are bound to show on the face of the proceedings that they "are acting within their authority," per Coleridge, J., in *Eastern Counties Railway Company* v. *Overseers of Moulton*, 25 L. J. (N.S.), M. C., 49.—See also *King* v. *Wavell*, 1 Dougl. 116. In *Galt* v. *Ritchie*, H. C., July 16, 1873, 2 Couper, 470, one objection to a conviction was that the complaint did not bear this heading. The Court did not call for an answer on this point, but quashed the conviction upon another; possibly the importance of the question was lost sight of among the numerous objections urged. In *Murray* v. *Allan*, *supra*, Lord-President (Inglis) regarded this heading as important.—11 Macph. p. 151.

Heading of Complaint.

[3] As being the person directly injured, or as having such an interest as is required by law to entitle him to prosecute.—Hume, ii. 125; Alison, ii. 111.

Instance.

[4] It is a general rule of construction of statutory forms, that "where a blank is left for inserting the offence, the same accuracy "is required in the description of it as in other cases."—Paley on "Summary Convictions," 5th Ed., p. 167. It is also a general rule in regard to summary complaints, that in all essential particulars (and the description of the crime charged is one), the same accuracy is required as in an indictment. Accordingly, what is charged must be a crime, and must be accurately described. If the crime possesses a proper *nomen juris*, such as theft, assault, or the like, it will of course be sufficient to insert it; but if an innominate offence is charged, or if the prosecutor, as he is entitled to do, prefers to substitute a full description of the crime for a *nomen juris*, the description must be complete and contain all the elements of a crime cognisable by the law of Scotland.—See Hume, i. 327-8 and 496, and ii. 169; and Bell's Notes, 174. As to what is required in charging innominate offences, see the cases of *James Miller*, H. C., Nov. 24, 1862, 4 Irv. 238; and *Michael Hinchy*, Perth, Sept. 30, 1864, 4 Irv. 561.

Description of crime charged.

Two or more crimes may be charged alternatively, if it is doubtful which will be established by the evidence. And generally, in so far as regards the description of the crime, the same rules and decisions are applicable alike to summary complaints and indictments.—See Hume, ii. 168, *et seq.*; Alison, ii. 228.

[5] Every material circumstance must here be set forth; the time and the place must be stated with as great particularity as possible; and although no technical form of words need be used, the matters

Particulars of charge.

SCHEDULE (A), No. 1. Complaint at common law.

alleged against the accused must be such as to constitute the crime charged.

Warrant for apprehension.

[6] That is, if not already in custody. Where the accused is taken in the act, or in cases of urgency, a signed information is not required before apprehension.—Hume, ii. 77; Alison, ii. 121; and *M'Vie and Linch* v. *Dykes*, May 28, 1856, 2 Irv. 429; and see sec. 6, *supra*, p. 81.

Service of Complaint.

[7] Where the accused is apprehended under a warrant, or is in custody, service of the complaint is not essential, but should be made if it is intended to proceed to trial at once; as otherwise the accused, on being brought before the Court, may require a copy of the complaint, and an adjournment for 48 hours.—See sec. 11, *supra*, p. 87; and Alison, ii. 48.

"The pains of law."

[8] Under this form it is not necessary, as it is under Schedule C of 9 Geo. IV., cap. 29, to specify the punishment concluded for; but the pains of law competent to follow on such a complaint are, of course, restricted to those mentioned in the recited Acts.

Designation of Prosecutor.

[9] Although perhaps not essential (see *M'Vie and Linch* v. *Dykes*, *supra*), the designation of the public prosecutor, or at least the letters P. F., should be added to his signature.

2. *Complaint praying for Conviction in Terms of Act, and for Imprisonment or Forfeiture.*[1]

UNDER THE SUMMARY PROCEDURE ACT, 1864.

Unto the Honourable Her Majesty's Justices of the Peace for the County of [*or* Sheriff of the County of *or* Magistrates of the Burgh of].

The Complaint of *A B*, Procurator Fiscal of Court [*or other Party entitled to prosecute*]:

Humbly showeth,

That *J K* [*Designation*] has contravened the Act [*or* has been guilty of an Offence within the Meaning of the Act] [*specify the Act or Acts*],[2] in so far as [*state Particulars of Contravention or Offence*],[3] whereby the said *J K* is liable [*state shortly the Nature of the Forfeiture or Penalty and the Alternative*].[4]

May it therefore please your Honours [*or* Lordship] to grant Warrant to apprehend the said *J K*, and bring him before you [*or*

to cite the said *J K* to appear before you] to answer to this Complaint,[5] and thereafter to convict him of the aforesaid Contravention, and to adjudge him to suffer the Penalties provided by the said Act [*or* Acts, or any of them.]

SCHEDULE (A), No. 2. Complaint under Statute.

[*Where a Warrant ad factum præstandum is desired, it must be specially prayed for.*]

According to Justice.

A B [*Signature of Complainer.*]

Strict construction.

[1] In prosecutions under penal statutes, summary complaints are as strictly construed as indictments or criminal libels in regard to everything pertaining to the substance of the charge or the jurisdiction of the Judge,—for the twofold reason that an offence is created and a punishment imposed which did not previously exist at common law, and that the accused's right to be tried by jury, or on a criminal libel without a jury, is taken away by summary proceedings being directed or authorised.

Reference to Act contravened.

[2] It is not necessary at this part of the complaint to quote the Act or section founded on. It is sufficient simply to refer to the section (*Byrnes and others* v. *Dick*, H. C., Feb. 23, 1853, 1 Irv. 145), or even to the Act generally (*Holland* v. *The Gauchalland Coal Company*, H. C., Dec. 27, 1867, 5 Irv. 561, and *Galt* v. *Ritchie*, July 16, 1873, 2 Couper, 470); unless it is necessary to specify the section in order to point out and define the offence intended to be charged (per Lord Justice-Clerk Inglis in *Thomson* v. *Wardlaw*, H. C., Jan. 23, 1865, 5 Irv. 49). But if the complainer professes to quote or to give the substance of the section founded on, he must do so fully and accurately. If he founds on the wrong section (*Hopton* v. *Wicks*, H. C., March 5, 1858, 3 Irv. 51), or only partially quotes the appropriate section when the part omitted is essential (*Thomson* v. *Wardlaw*, *supra*), the proceedings will be quashed,

The easiest if not the best way is to say that the accused "has "contravened the Act (or a particular section of it) in so far as," &c. This frees the prosecutor from the risk of misquotation or omission, at least in one limb of his complaint; but it will be seen that the difficulty is only deferred, and arises in a shape quite as formidable when the complainer comes to state the particulars of the contravention and the nature of the penalty.

[3] In regard to the requisites of a statutory charge the following points may be noted:—

Requisites of statutory charge.

(1), In statutory charges, even more than in complaints at common law, it is necessary to be precise as to time and place. Not only must fair notice be given to the accused, but it is right that it should appear upon the face of the complaint that it is brought within the time limited by statute, and also that the

SCHEDULE (A), No. 2. Requisites of statutory charge.

offence charged was committed within the jurisdiction of the Magistrate. Again, in some cases (*e.g.* under the Game and Public Houses Acts), time is of the essence of the charge.

(2), In stating the particulars of the contravention charged the complaint must be framed with strict reference to the terms of the special Act. Where the Act describes the offence in detail, the words of the Act should be followed, care being taken to distinguish when more offences than that to be charged are described in the section founded on. But where the Act describes the offence in general terms, which, construed literally, include matters manifestly not within the intent of the Act, it has been held not to be sufficient to use the words of the Act in describing the contravention.—Per Lord Mansfield in *Rex* v. *Corden*, 1769, 4 Burr. 2,279; Paley on "Summary Convictions," 5 Ed. 212, *et seq.*, and *Turner's Case*, June 1, 1846, 9 Ad. and Ell., Q. B. 80. To obviate objections on this head, it is sometimes enacted that the description of the offence in the words of the Act shall be sufficient in law.—See 34 and 35 Vict., cap. 112 ("The Prosecution of Crimes Act, 1871"), sec. 17. Where there is no such statutory provision the complaint must state the particular overt act falling under the general description which is charged against the accused, and the act so stated must constitute an offence within the spirit of the statute; for "if the fact, as charged, may be consistent with the "innocence of the prisoner, no offence is charged."—Per Williams, J., 9 Ad. and Ell., Q. B. 91.

The complaint should state in express terms every essential ingredient or qualification required by the statute. Thus, where the statute sets forth certain qualities or qualifications as being essential to the offence, it must be closely followed. If the acts struck at are described as being done "knowingly" (*Rex* v. *Jukes*, 8 T. R. 536, and *John Anderson*, H. C., Dec. 14, 1846, Ark. 187), or "wilfully, maliciously, and unlawfully" (*James Affleck*, H. C., May 23, 1842, 1 Broun, 354), or "with intent to defraud," or "for the purpose of taking or destroying game or rabbits,"—these phrases must appear in express terms in the complaint. Any omission in this respect may be fatal, and it is not safe to substitute other words, however similar in meaning they may be.—(*John Anderson, supra*).

In the recent case of *Arthur* v. *Peebles*, H. C., June 30, 1876, a complaint, brought under the Summary Procedure Act, charged the suspender with having committed two offences within the meaning of the first section of the Day Trespass Act, 3 Will. IV., cap. 68, "by entering or being, without the leave of the proprietor, "*in and near* certain lands," in the parish of Old Monkland, "in "search or pursuit of game," &c. The Justice, after proof, convicted the accused of "the offence charged," and sentenced him to pay a penalty and expenses, and, in default of payment, ordained immediate imprisonment.

This conviction and sentence were suspended by the High Court of Justiciary. The Court held that the words of the statute, viz.

"by entering or being upon," or words exactly equivalent, should have been used in the complaint; that the words "in and near" were misleading, and calculated to induce a belief that conviction was competent on evidence of the accused having been "near," but not "upon" the lands, which is not an offence under the statute; and that the conviction being "of the offence charged," must be held to have proceeded partly upon this assumption.

SCHEDULE (A), No. 2. Requisites of statutory charge.

The objection was not technical, if it be true, as was alleged, that the accused was not proved to have been upon the lands at all, and that he did not leave the road, but hunted the field with dogs.

Some important observations were made by Lords Young and Craighill as to the necessity of closely following the words of the statute in framing a statutory charge. The conviction might perhaps have been sustained, if, instead of being general, it had discriminated, and convicted of being "in the lands;" but this is by no means certain, and it appears to be the fair result of the authorities just referred to that the exact words of the statute should be used in charging a statutory offence.

(3), Any exemption, excuse, or qualification, which is adjected to the description of the offence in the enacting clause, or incorporated by reference, must be distinctly and positively negatived in the complaint; but this is not necessary if the proviso in question is stated separately in another clause of the same statute, or in another statute, or even in the enacting clause itself, provided it is distinctly separable from the description.—See *Steel* v. *Smith*, 1 B. and Ald. 94, and Okes' "Magisterial Synopsis," i. 133. In the latter case, it will lie upon the accused to prove the exemption. —See also Paley on "Summary Convictions," 5th Ed. p. 220-232.

It must be remembered, in dealing with English authorities on this subject, that, especially since the passing of the English Summary Procedure Act, 11 and 12 Vict., cap. 43, the writ looked to by the Court of review as containing the charge upon which the accused has been convicted, is not the information or complaint, as with us, but the conviction, which contains, or ought to contain, the whole grounds of the Justices' adjudication, including the charge against the accused.

Statement of penalty; alternative if any must be stated also.

[4] If the complainer professes to state the nature of the forfeiture or penalty, he must also state the alternative if there is one, so that the Magistrate may have fully before him the various penalties or punishments which it is within his power to impose.—*Thomson* v. *Wardlaw*, H. C., Jan. 23, 1865, 5 Irv. 45. But it appears to be sufficient to state that the accused is liable in the penalties set forth in certain sections, or a certain section, of the Act, or to pray that he may be adjudicated upon under certain sections—*Holland* v. *The Gauchalland Coal Co.*, Dec. 24, 1867, 5 Irv. 561; and *Galt* v. *Ritchie*, H. C., July 16, 1873, 2 Couper, 470. In the case last named, the complaint prayed that the accused should be "summoned and adjudicated upon under sections 4 and 9 of the "Master and Servant Act, 1867." It was objected that the dif-

SCHEDULE (A), No. 2. Requisites of statutory charge.

ferent alternatives competent to the Justices were not properly set forth; and the cases of *Thomson* v. *Wardlaw*, and *Baird* v. *Rose*, Ayr, Sept. 27, 1865, 5 Irv. 200, were referred to. In reference to the case of *Thomson* v. *Wardlaw*, Lord Justice-Clerk (Moncreiff) said (p. 474), "The prayer in the complaint in that case was misleading;" and (p. 477), "In regard to the objection that all the alternatives "competent to the Justices to adopt upon conviction were not set "forth in the complaint, I believe your Lordships are of opinion "with me that the case of *Thomson* v. *Wardlaw*, H. C., Dec. 23, "1865, relied upon for the suspender, must now be held to have "proceeded on the ground that the statement of the alternatives "open to the Justices under the statute there libelled, contained "in the prayer of the complaint, was misleading; and that the case "of *Holland* v. *The Gauchalland Coal Company*, H. C., Dec. 24, "1867, establishes that a complaint praying, like the present, that "the employed be summoned and adjudicated upon under section "9 of the Master and Servant Act, 1867, is unobjectionable."

Terms of prayer.

[5] The terms of the prayer, and of the warrant to follow upon it, will depend upon the circumstances of the case and the terms of the statute founded on. Some statutes expressly authorise apprehension without a warrant; for instance, the Day Trespass Act, 2 and 3 Will. IV., cap. 68, and the Merchant Shipping Act, 17 and 18 Vict., cap. 104, sec. 246.—See Okes' "Magisterial Synopsis," vol. i. p. 141. If the accused is in custody, the complaint will pray that he brought before the Magistrate. If he is not in custody, it will depend upon the terms of the special statute whether it is competent immediately to grant a warrant for his apprehension, or whether it is necessary in the first instance to grant warrant for his citation. Even where apprehension in the first instance is competent, the Magistrate has a discretionary power of granting a warrant for the citation of the respondent in place of a warrant for apprehension—see section 6, *supra*, p. 81; and this course will probably be followed where the respondent is known to be law abiding, especially where only a money penalty is sued for.

SCHEDULE (B).

SCHEDULE (B).

Oath of Verity.

At the day of in presence of

Compeared *A B*, the Complainer, [*or* a credible Witness, *as the Case may be*,] who being solemnly sworn, depones that what is contained in the foregoing Complaint is true, as he shall answer to God.

[*Signature of Complainer or Witness.*]
[*Signature of Judge.*]

SCHEDULE (C).

SCHEDULE (C).

Warrant for Citation of Respondent.

The Justice [*or* Sheriff, *or* Magistrate, *or* Clerk of Court] grants Warrant to Officers of Court to serve a Copy of the foregoing Complaint and of this Deliverance upon *J K*, Respondent, and to cite him to appear personally to answer thereto at [*Court House or Place*] upon the day of , at o'Clock noon, with Certification, and also to cite Witnesses or Havers for both Parties for all diets in the Cause.*

[*Signature of Judge or Clerk of Court.*]

SCHEDULE (D).

SCHEDULE (D).

1. *Warrant for Apprehension of Respondent in the First Instance.*

The Justice [*or* Sheriff *or* Magistrate] grants Warrant to Officers of Court to search for and apprehend *J K*, Respondent, and, if necessary for that Purpose, to open any shut or lockfast Places, and to bring him before any one or more, as may be competent, of Her Majesty's Justices of the Peace for the County of , [*or* the Sheriff of the County of , *or* a Magistrate of the Burgh of ,] to answer to the foregoing Complaint at [*Court House or Place*], and in the meantime to detain him in a Police Station House or other convenient Place, and also to cite Witnesses and Havers for both Parties for all Diets in the cause.*

[*Signature of Judge.*]

2. *Warrant for Apprehension of the Respondent in the Second Instance.*

The Justice [*or* Sheriff *or* Magistrate], in respect *J K*, Respondent, has failed to appear to answer

SCHEDULE (D). Warrant for Apprehension.

to answer to the foregoing Complaint after being duly cited to this Diet, grants Warrant to Officers of Court to search for and apprehend the said *J K*, and, if necessary for that Purpose, to open any shut or lockfast Places, and to bring him before any one or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [*or* the Sheriff of the County of , *or* a Magistrate of the Burgh of ,] and in the meantime to detain him in a Police Station House or other convenient Place, and also to cite Witnesses and Havers for both Parties for all Diets in the Cause.*

[*Signature of Judge.*]

* [*A Warrant to search for stolen Goods or other Search Warrant may be prayed for in the Complaint, and included in the Warrant of Citation or Apprehension, if otherwise competent.*][1]

[1] The application for and granting of a search warrant are matters of considerable delicacy, calling for the careful consideration both of prosecutor and magistrate; the more so that, according to the law of Scotland, it is not necessary that such a warrant should proceed on the oath of the applicant, or of any other party, and that, if granted, its execution is usually intrusted to the discretion of a sheriff-officer or constable.

A search warrant, general in its terms, both as to the goods stolen and the houses to be searched, is illegal. "It is a different "and a far more exceptionable sort of warrant which is general as "to the person charged, and commands the bearer to apprehend all "persons suspected of the matters there set forth, or to make "search everywhere for stolen goods or the like. For, under a "warrant of this shape, everything is committed to the judgment "and discretion of the officer; which is very dangerous, and may "prove the occasion of great abuses."—Hume, ii. 78. "The "search warrant must be special as to the goods intended to be "searched for, or at least the felony which it is intended to eluci-"date and bring to punishment by the warrant craved for; but "it does not appear to be indispensable that it should set forth the "particular house meant to be searched for these goods, any more "than the particular place where the criminal is suspected to be con-"cealed. It seems, in short, to be a sufficient authority to search "for the goods specified, taken on the felonious occasion charged,

"everywhere, in the same manner as it is sufficient warrant to "search for the individual suspected wherever he is to be found." . . . "Beyond all question, a warrant is illegal which should "authorise officers to search everywhere for stolen goods generally, "without specifying either the goods sought for or the houses sus-"pected. If the former is not known and specified, the latter "must be enumerated by place and name."—Alison, ii. 146, 147.

SCHEDULE (D).

Search warrants, when competent.

Accordingly, in *Webster* v. *Bethune*, H. C., Feb. 7, 1857, 2 Irv. 596, a search warrant, which contained no statement as to the time when, or the person by whom, the articles had been stolen, or as to the houses to be searched, was suspended as illegal.

When the articles to be searched for are not stolen goods still more care is required. In *Bell* v. *Black and Morrison*, H. C., Jan. 30, 1865, 5 Irv. 57, joint Procurators-Fiscal, in the course of taking a precognition against a person named Pringle, on a charge of conspiring to murder, &c., presented a petition to the Sheriff stating that certain persons other than Pringle, particularly the suspender Bell, had been engaged in the said conspiracy, and that they (the petitioners) had reason to believe "that written documents and other articles "referring to and connected with the said conspiracy" were in the possession of Bell and others. The prayer was "to grant warrant "to officers of Court and their assistants to search the dwelling-"house, repositories, and premises at Glenduckie, occupied by the "said John Bell, &c., . . . for the said written documents, "and all other articles tending to establish guilt, or participation "in said crimes, and to take possession thereof, to be produced be-"fore your Lordship; or otherwise to do in the premises as to your "Lordship shall seem proper."

Bell v. *Black and Morrison.*

The Sheriff-substitute granted warrant "to search the dwelling-"houses, repositories, and premises" as craved.

This warrant was executed on the following day. Bell brought a suspension of the warrant, and the Court of Justiciary suspended it as illegal, on the following grounds, as stated in the opinion of Lord Justice-Clerk (Inglis), pp. 63, 64:—(1), That none of the five parties against whom the warrant was granted were under charge, or had notice of the application for or granting of the warrant; (2), That there was no proper limitation as to the kind of papers to be searched for; and (3), That the execution of the warrant was intrusted absolutely and without control to ordinary sheriff-officers and their assistants.

The last seems to be the strongest ground of judgment, and that it was so regarded by the Bench appears from the report of an action of damages which arose out of these proceedings, viz. *Nelson* v. *Black and Morrison*, Jan. 26, 1866, 4 Macph. 328. It was observed from the Bench that a legal warrant might have been granted, on the Procurator-Fiscal's petition, if the warrant had been limited to a search for particular documents, or if it had been appointed to be carried out under proper supervision. The Lord-President (M'Neill) said (p. 330):—"I think it was compe-"tent for the Sheriff, under this application, to grant a perfectly

SCHEDULE (D). Search warrants, when competent.

"legal warrant. For example, if he had limited the search to "particular documents, or appointed it to be carried out at the "sight of the Sheriff himself, I cannot say that there would been "any illegality in such a warrant. That has not been done. But "it does not follow that the defender's application was out and out "and in substance contrary to law." Lord Deas said (p. 331):—

Bell v. *Black and Morrison.*

"Looking at the case in that light, I agree with your Lordship "that this was an application under which a perfectly legal warrant "might have been granted; and I think that if the qualification sug-"gested by your Lordship had been introduced into the warrant, "viz. that it was to be executed at sight of the Sheriff or Sheriff-"substitute, it would have been difficult to say that any objection "to it remained—particularly keeping in view that the charge as "to which evidence was sought was a charge of conspiracy against "a number of individuals, some of whom were known, and some "were not known; and, although the pursuer was not then actu-"ally apprehended, and under charge for this conspiracy, it is "stated in the body of the petition that documentary evidence had "already been recovered which shewed that he was one of the "parties engaged in the conspiracy. I think that, in a case of that "kind, a perfectly legal warrant might have been granted under "this petition; and I see nothing in the judgment of the Court "of Justiciary inconsistent with this view, or with what has now "been expressed by your Lordship." Lord Ardmillan, who was one of the Judges who decided the suspension, vindicated that judgment on the following grounds (p. 332):—"The crime charged "was a conspiracy, and the writing of threatening letters, and an "attempt to take the life of the Rev. Mr Edgar and Mr Ballingal, "farmer in Dunbog; and in the investigation of that offence, "involving the very serious element of conspiracy, the public pro-"secutor is entitled to support. But at the same time a general "warrant for a sweeping and indefinite search in the dwelling-"house of a person not put under charge, for written documents "in regard to which there is this peculiarity, that they must be "read before it can be seen what they instruct, is a very strong "and startling procedure; and, if granted at all, such a warrant "should have been accompanied by some security against oppres-"sion, and against the violation of private confidence. The most "secret and sacred writings were or might be exposed to the per-"usal of a sheriff-officer and his concurrents; and the personal "attendance of the Sheriff, or some person of discretion and "authority, to superintend the search, and to inspect and select "the documents, was, in my opinion, necessary to secure the fair "execution of the warrant, and to prevent its having oppressive "consequences. The illegality of the warrant lay in the absence "of such securities.

"I am not prepared to say that a general search warrant for "articles of evidence, and, among other articles, for written docu-"ments tending to instruct an occult conspiracy, could not, in any "case, be granted to the public prosecutor against parties named

"in the petition, if accompanied by proper securities against "oppressive execution. I agree with your Lordship that such a "warrant might have been legally granted. No such case was "presented to the Court of Justiciary, or is now here. This war-"rant is without restriction, limitation, or security against prying "curiosity, or reckless violation of confidence, and, as taken and "executed against Bell, it was illegal."

SCHEDULE (D). Search warrants, when competent.

By sec. 16 of 33 and 34 Vict., cap. 112 (The Prevention of Crimes Act, 1871), a limited power is given to the chief officer of police (defined to be in Scotland the chief constable or other officer having chief command of the police in the police district) to authorise any constable *in writing*, and without specifying any particular property, to search for stolen property, or any property which he (the chief officer) may believe to have been stolen; and for that purpose to enter and search any house or other premises, in the same manner as if he had a regular search warrant. But this power is confined to two cases.

"*First*, When the premises to be searched are, or within the "preceding twelve months have been, in the occupation of any "person who has been convicted of receiving stolen property, or of "harbouring thieves; or,

"*Second*, When the premises to be searched are in the occupa-"tion of any person who has been convicted of any offence involving "fraud or dishonesty, and punishable by penal servitude or im-"prisonment."

English procedure as to search warrants.

In England (apart from the provisions of the Prevention of Crime Act, 1871, or other special enactment), a search warrant is only granted after oath by the applicant that the goods to be searched for have been stolen, or that he has reasonable grounds for suspecting that they have been stolen; and that he has reasonable grounds for believing that they are in the house or premises of a particular person named.

The warrant must be granted by a Magistrate of the jurisdiction in which the premises to be searched are situate; it is directed to a constable who may act within his own or the adjoining county. The premises to be searched should be specified; and the search should be directed to be made in the daytime, unless there be some strong reason for doing otherwise.—Archbold's "Justice of "the Peace," 7th Ed. ii. 1813.

SCHEDULE (E).

SCHEDULE (E).

1. *Warrant for the Apprehension of a Witness in the First Instance.*

The Justice [*or* Sheriff *or* Magistrate], in respect it has been made to appear to him upon Oath that *E F* [*Designation*] is likely to give material Evidence

SCHEDULE (E). Apprehension of Witness.

for the Prosecution in the foregoing Complaint [*if the Complaint is on a separate Paper, describe it by the Names of the Parties and Date of Presentation*], and that it is probable that the said *E F* will not attend to give Evidence without being compelled so to do, grants Warrant to Officers of Court to search for and apprehended the said *E F*, and, if necessary for that Purpose, to open any shut or lockfast Places, and in the meantime to detain him in a Police Station House or other convenient Place, and to bring and have him on the Day of , at o'Clock noon, before any one or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [*or* the Sheriff of the County of , *or* a Magistrate of the Burgh of], to bear Witness for the Prosecution in the foresaid Complaint.

[*Signature of Judge.*]

2. *Warrant for the Apprehension of a Witness in the Second Instance.*

The Justice [*or* Sheriff *or* Magistrate], in respect that *E F* [*Designation*] has failed to appear after having been duly cited to bear Witness for the Prosecution [*or* for the Respondent] in the foregoing Complaint [*if the Complaint is on a separate Paper, describe it by the Names of the Parties and Date of Presentation*], and no just Excuse has been offered on his Behalf, grants Warrant to Officers of Court to search for and apprehend the said *E F*, and, if necessary for that Purpose, to open any shut or lockfast places, and in the meantime to detain him in a Police Station House or other convenient Place, and to bring and have him on the Day of , at o'Clock noon, before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [*or* the Sheriff of the County of , *or* a Magistrate of the Burgh of], to bear Witness for the

Prosecution [*or* for the Respondent] in the foresaid Complaint.

[*Signature of Judge.*]

SCHEDULE (E). Apprehension of Witness.

SCHEDULE (F).

SCHEDULE (F).

1. *Citation of Respondent.*

To *J K* [*Designation*].

Take Notice that you are required to appear personally at the Place and Time specified in the Warrant, of which the foregoing is a Copy, to answer to the Complaint to which this Notice is attached, with Certification.

This I do on the Day of .

[*Signature of Officer.*]

2. *Citation of Witness.*

To *E F* [*Designation*].

Take Notice that you are required to appear before any one of Her Majesty's Justices of the Peace for the County of [*or* the Sheriff of the County of , *or* a Magistrate of the Burgh of ,] at [*Court House or Place*] on the Day of , at the Hour of o'Clock noon, and at any adjourned Diet which you may be required to attend, to bear Witness for the Prosecution [or for the Respondent] in the Complaint at the Instance of *A B* [*Designation*], against *J K* [*Designation*], under Certification; [and also to bring with you and exhibit such of the Documents mentioned in the subjoined Lists as may be in your Possession.]

This I do on the Day of .

[*Signature of Officer.*]

SCHEDULE (H).[1]

SCHEDULE (H).

1. *Interlocutor adjourning the Diet.*

The Justice [*or* Sheriff *or* Magistrate] adjourns

SCHEDULE (H). Adjournment of Diet, &c.

the Diet to the Day of , and appoints the said *J K* to appear personally on that Day at o'Clock noon.

[*Signature of Judge.*]

2. *Adjournment and Interim Warrant of Imprisonment.*[2]

The Justice [*or* Sheriff *or* Magistrate] adjourns the Diet to the Day of , and in the meantime grants Warrant to commit the said *J K* to the Prison of , therein to be detained until that Time, or until he find Caution to appear at all future Diets of Court under a Penalty of £ .

[*Signature of Judge.*]

[1] See sections 7, 11 and 12.
[2] See section 12, note 4.

SCHEDULE (I).

SCHEDULE (I).

Minute of Procedure at the Hearing.

1. *When the Respondent appears.*[1]

At , the Day of , in the Presence of of Her Majesty's Justices of the Peace for the County of [*or* Sheriff *or* Magistrate], appeared *J K*, complained against; and the Complaint being read over to him, he answers that he is Not Guilty [*or* that he is Guilty.]

[*Signature.*]

[*If the Respondent pleads Not Guilty.*]

The Witness [*or* Witnesses] after-named was [*or* were] examined in Support of the Complaint, viz. :—

And the Witness [*or* Witnesses] after-named was [*or* were] examined in Exculpation, viz. :—

[*Note also the Production of any Documents produced in Evidence by either Party.*]

2. *When the Respondent is absent.*[2]

At , the Day of , in Presence of of Her Majesty's Justices of the Peace for the County of [*or* Sheriff *or* Magistrate], *J K*, complained against, having failed to appear, after having been duly summoned.

The Witness [*or* Witnesses] after-named was [*or* were] examined in Support of the Complaint, viz. :—

[*Note also any Productions.*]

[1] See sections 5, 14 and 16, and notes.
[2] See sections 7 and 15.

SCHEDULE (K).[1]

SCHEDULE (K).

1. *Conviction for Offences at Common Law.*

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], find the said *J K* guilty of the Crime charged [*or state to what Extent he is guilty*], and therefore [*state the Terms of the Sentence.*]

[*Signature of Judges or Judge.*]

[1] These forms are directory, not imperative, and they need not be followed *verbatim.* At the same time, they should be followed as closely as the nature and circumstances of the complaint will permit. They require careful study, as there is no short road to understanding and following them. On the one hand, they are necessarily not exhaustive, and may require to be supplemented; on the other, they are framed to meet various alternatives, and therefore care must be taken to select those parts which really apply to the case in hand. Form 1 applies to offences at common law; Forms 2-7 to statutory prosecutions. In applying the latter, the special statute and sections 18 and 19 of this Act should be carefully referred to.

2. *Conviction for Contravention of Act punishable by Imprisonment.*[1]

The Justices [*or* Justice, *or* Sheriff, *or* Magis-

SCHEDULE (K). Form of Conviction, No. 2.

trate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], convict the said *J K* of the Contravention [*or* Offence] charged [*or state to what Extent he is guilty*],[2] and, therefore, adjudge him to be imprisoned in the Prison of for the Period of from this Date [*or* from the Date of his Imprisonment].[3] [*If authorised by the Act, add,* and find him liable in Payment to the Complainer of £ of Expenses, and adjudge him to be imprisoned in the said Prison for the further Period of Days from the expiration of the last-mentioned Period, unless the said Sum shall be sooner paid],[4] and grant Warrant to Officers of Court to apprehend him[5] and convey him to the said Prison, and to the Keeper thereof to receive and detain him accordingly. [*Signature of Judges*[6] *or Judge.*]

[1] This applies to statutory offences, in respect of which the accused is (1) liable to be imprisoned, or (2) to be imprisoned *or* fined in the discretion of the Court. If a fine is inflicted, one of the subsequent forms must be used.

[2] In framing a conviction of a statutory offence great care and accuracy are required. The description of the matters found proved must amount to the statutory offence charged.—*Craig* v. *The Great North of Scotland Railway Co.*, H. C., Nov. 20, 1865, 5 Irv. 206, and *Gardner* v. *Dymock*, 5 Irv. 13. The precise punishment, neither more nor less, authorised by the statute must be imposed.—*Ferguson* v. *Thom*, H. C., June 30, 1862, 4 Irv. 196. Where there are alternative charges, the conviction must discriminate, and must not be in general terms—*M'Nab* v. *Glass*, H. C., Jan. 22, 1842, 1 Broun, 41 ; or convict of "both charges"—*Mains* v. *MacLullich and Fraser*, 3 Irv. 533. On this subject see notes to Schedule (A), No. 2, *supra*, p. 127.

[3] The imprisonment here competent is imprisonment "for a "specified period." The proceedings are therefore criminal *quoad* review.

[4] See section 22, and notes.

[5] These words are unnecessary, and may be dispensed with when the accused is present.—*Kinnear and Brymer* v. *Whyte*, H. C., May 25, 1868, 1 Couper, 56, 1st point.

[6] Where the charge is declared by the statute to be cognisable by *two* or *more* Justices, the conviction or judgment must be signed by such number of Justices present at the hearing and concurring in the result thereof as may be required by the statute.—Section 21, and notes.

SCHEDULE (K). Form of Conviction, No 3.

3. *Conviction for a Penalty, and, in default of Payment, Imprisonment.*[1]

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], convict the said *J K* of the Contravention [*or* Offence] charged [*or state to what Extent he is guilty*],[2] and therefore adjudge him to forfeit and pay the Sum of £ of Penalty [*or* of modified Penalty, *where there is Power to modify*], [with the Sum of £ of Expenses, *where Expenses may be awarded*][3], and in default of immediate Payment thereof [*or, if Time be allowed, say,* within Days from this Date], adjudge him to be imprisoned in the Prison of for the Period of from the Date of his Imprisonment,[4] unless the said Sum [*or* Sums] shall be sooner paid, and grant Warrant to Officers of Court to apprehend him and convey him to the said Prison, and to the Keeper thereof to receive and detain him accordingly.

[*Signature of Judges*[5] *or Judge.*]

[1] This applies to statutory offences, in respect of which the accused is liable—(1) To forfeit a penalty; and (2) In default of payment thereof, to be imprisoned for a limited period, the imprisonment coming in lieu of the penalty.

[2] See form 2, note 2.

[3] See section 22, and notes.

[4] See form 2, note 3.

[5] See form 2, note 6.

4. *Conviction for a Penalty to be recovered by Poinding, and in default of Recovery, Imprisonment.*[1]

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], convict the said *J K* of the Contravention [*or* Offence] charged [*or state to what Extent he is guilty*],[2] and therefore adjudge him to forfeit and pay the Sum of £ of Penalty [or of modified Penalty, *where there is Power to modify*], [with the Sum of £ of Expenses, *where Ex-*

SCHEDULE (K). Form of Conviction, No. 4.

penses may be awarded],[3] and *[4] in default of immediate Payment thereof [*or, if Time is allowed, say,* within Days from this Date] grant Warrant for recovery of the said Sum or Sums by Poinding of his Goods and Effects, and summary Sale thereof, on the Expiration of not less than Forty-eight Hours after such Poinding, without further Notice or Warrant, and appoint a Return or Execution of such Poinding and Sale to be made within Eight Days from this Date [*or*, from the Expiration of the Period herein allowed for Payment, *where Time is allowed*], under Certification of Imprisonment for the Period of[5] in default of Payment or Recovery of the said Sums, with the Expenses of Diligence before the Time allowed for such Report.

[*Signature of Judges*[6] *or Judge.*]

Report by Officer of Court.

I, *X Y*, report, that by virtue of the foregoing Judgment and Warrant, I have made diligent Search for Goods and Effects of the within-mentioned *J K*, and that I can find no sufficient Goods and Effects whereon to levy the Sums within mentioned.

Humbly reported this Day of by

[*Signature of Officer.*]

Warrant of Imprisonment.

At , the Day of , the Justice [*or* Sheriff *or* Magistrate], in respect it appears that the Sum [*or* Sums] mentioned in the foregoing Conviction, with the Expenses of Diligence, have not been paid, and that no sufficient Goods and Effects can be found whereon to levy the said Sum [*or* Sums] and Expenses, grants Warrant to Officers of Court to apprehend the said *J K*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him from the Period of from the Date of his Imprisonment, unless the said Sum [*or* Sums], with the further Sum of £

for the Expenses of Diligence, shall be sooner paid. [*Signature of Judge.*][7]

[1] This applies to statutory offences, in respect of which the accused is liable—(1) To a penalty which may be recovered by poinding, or distress and sale, or other summary process of execution by sale; and (2) In default of payment or recovery by such process of execution within the time named, to imprisonment for a limited period.

[2] See form 2, note 2.

[3] See section 22, and notes.

[4] See form appended to No. 6. The said form, if used, should be substituted for the rest of this form, from the word "and," including report by officer and warrant of imprisonment. See also section 19, and notes 3 and 5 to section 18. In reference to the case of *M'Donell*, there quoted, it should be stated that an apparently conflicting decision was subsequently pronounced on Circuit, viz., *Rhodes* v. *Ross*, Stirling, Sept. 23, 1870, 1 Couper, 469, 2d point. The case of *M'Donell* was not quoted; but the question seems to deserve reconsideration by the High Court, it being doubtful whether section 19 of this Act applies to the case in point.

[5] See form 2, note 3.

[6] See form 2, note 6.

[7] This being a warrant "subsequent to conviction," may be signed by one Justice, who need not have been present at the hearing. Section 21, and notes.

5. *Conviction for a Penalty to be recovered by Poinding and Imprisonment.*[1]

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], convict the said *J K* of the Contravention [*or* Offence] charged [*or state to what Extent he is guilty*],[2] and therefore adjudge him to forfeit and pay the Sum of £ of Penalty [*or* of modified Penalty *where there is Power to modify*], with the Sum of £ of Expenses, *where Expenses may be awarded*],[3] and *[4] ordain instant Execution by Poinding and Sale, and Imprisonment for the Period of Days,[5] in default of immediate Payment [*or if Time is allowed, say*, within Days from this Date]; grant Warrant to Officers of Court, in default of Payment of the said Sum [*or* Sums], for immediate Poinding of the Goods and Effects of the said *J K*, and

SCHEDULE (K). Form of Conviction, No. 5.

summary Sale thereof on the Expiration of not less than Forty-Eight Hours after such Poinding; appoint a Return of such Poinding and Sale to be reported within Eight Days from this Date; and in default of Payment grant Warrant to Officers of Court to apprehend the said *J K*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him for the Period of Days from the Date of his Imprisonment, unless the said Sum [*or* Sums], together with the Expense of Poinding, if any, shall be sooner paid, or Liberation shall be granted.

[*Signature of Judges*[6] *or Judge.*]

Warrant of Liberation.

The Justice [*or* Sheriff *or* Magistrate], in respect the Complainer has failed to certify by the Report of an Officer of Court that no sufficient Goods and Effects of the said *J K* can be found whereon to levy the Sums specified in the foregoing Conviction within the Period of Eight Days therein mentioned [*or* in respect that a sufficient Poinding and Sale of the Effects of the said *J K* has been made], grants Warrant to the Keeper of the Prison of for the immediate Liberation of the said *J K*.

[*Signature of Judge.*[7]]

[1] Applies where under the special Act (1) the accused is liable to a penalty recoverable by poinding, &c., and where (2) the Act authorises immediate imprisonment for a limited period; the imprisonment being concurrent with and not merely in default of recovery by such process of execution. A time (8 days) is named in the warrant, within which a return of the poinding and sale must be reported; and if the result of the poinding is not certified by the complainers within that time, or if a sufficient poinding and sale is made, warrant is granted for the immediate liberation of the accused.

[2] See form 2, note 2.

[3] See section 22, and notes.

[4] See form appended to No. 6, and section 19; and notes 3 and 5 to section 18. See also form 4, note 4.

[5] See form 2, note 3.

[6] See form 2, note 6.

[7] See form 4, note 7, and section 21, and notes.

6. *Judgment for a Penalty recoverable by Diligence.*[1] SCHEDULE (K). Form of Conviction, No. 6.

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], convict the said *J K* of the Contravention [*or* Offence] charged [*or state to what Extent he is guilty*],[2] and therefore adjudge him to forfeit and pay the Sum of £ of Penalty [*or* modified Penalty, *where there is Power to modify*], of £ , and also find the said *J K* liable in £ of Expenses to the Complainer, and* ordain instant Execution by Arrestment, and also Execution by Poinding [and Imprisonment, *where there is Power to imprison*]; grant Warrant to Officers of Court to arrest all Debts and Sums of Money owing to the said *J K*, and [*if Time is allowed, add,* in default of Payment within Days from this Date] to poind his Goods and Effects and to sell the same at the Expiration of not less than Forty-eight Hours after such Poinding, without further Notice or Warrant; [*where the Act authorizes*[3] *Imprisonment, add*], and appoint a Return or Execution of such Poinding and Sale to made within Days from the Expiration of the Period hereby allowed for Payment, under Certification of Imprisonment [*if for a Term specify the Term*], in default of Payment or Recovery of the said Sums, with the Expenses of Diligence before the Time allowed for such Report.

[*Signature of Judges or Judge.*]

Warrant of Imprisonment to be granted upon Officer's Report.

The Justice [*or* Sheriff *or* Magistrate], in respect it appears that the Sums mentioned in the foregoing Judgment, with the Expenses of Diligence, have not been paid or recovered under the said Judgment in whole or in part, grants Warrant to Officers of Court to apprehend the said *J K*, and convey

SCHEDULE (K). Form of Conviction, No. 6.

him to the Prison of , and to the Keeper thereof to receive and detain him until liberated in due Course of Law [*or, if the Imprisonment is for a Term, say,* for the Period of Days from the Date of his Imprisonment, unless the said sums, with £ for the Expenses of Diligence, shall be sooner paid.]

[*Signature of Judge.*]

*[*If at the Hearing it shall appear that the issuing of a Warrant of Arrestment, Poinding, and Sale would be inexpedient,*[4] *then, in place of the Warrant annexed to the Judgment in the preceding Form, say:*

And in respect it is inexpedient to issue a Warrant of Poinding and Sale [*or* of Arrestment, Poinding, and Sale], ordain instant Execution by Imprisonment, and grant Warrant to Officers of Court to apprehend the said *J K*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him for the Period of from the Date of his Imprisonment, unless the said Penalty and Expenses shall be sooner paid.]

[*This Form only to be used where the Acts founded on authorize*[3] *Imprisonment for a specified Period.*]

[1] This form and the relative subsection (6) of section 18 require careful examination, as they relate partly to civil, partly to criminal proceedings. The first half of subsection (6) relates to statutory prosecutions—Where (1.) There is no special provision made in the statute for the recovery of the penalty, or for the substitution of a term of imprisonment in default of payment; and (2.) The penalty is declared to be recoverable by action, civil process, or diligence. In such cases, it is provided that the judgment of the Court shall authorise execution by arrestment, poinding, and sale, and imprisonment "until liberated in due course of law," unless recovery by imprisonment is excluded by the terms of the special Act. These cases are all civil, *quoad* review, and sentence of imprisonment "for a limited period" cannot competently be pronounced in any of them. *Immediate* imprisonment is also incompetent.—See notes 3, 7, and 8 to section 18 and section 28. The second half of subsection (6) relates to cases where, under the

special Statute, provision is made for the recovery of the penalty by arrestment, poinding, or distress and sale, or imprisonment, or by any combination of these forms of diligence, other than as provided for in the first half of the subsection. These cases may be either civil or criminal, but it is provided (and it should be noted that this proviso seems to apply only to the latter half of the subsection), that no warrant of imprisonment shall be issued until after the period allowed for arrestment or poinding—"except in the event "mentioned in the said Form, No. 6." That event, it will be seen from the form and relative declarations prefixed and appended to it, is where the Acts founded on "authorise," (that is, "do not "exclude") imprisonment *for a specified period*, and it appears to the Judge inexpedient to issue a warrant of arrestment, poinding, and sale. All such cases are criminal.—See notes 3, 7, 8, and 9 to section 18.

In applying Form No. 6, care must be taken to distinguish between those parts of it which relate to civil proceedings, and in which imprisonment, "until liberated in due course of law," is the appropriate punishment, and those which relate to criminal proceedings, in which imprisonment "for a term" should be awarded,

[2] See form 2, note 2.

[3] That is, "do not exclude."—See *Murray* v. *Jones*, H. C., June 17, 1872, 2 Couper, 284; and note 7 to section 18.

[4] See note 3 to section 18.

7. *Judgment and Warrant Ad factum præstandum, and in default, Imprisonment.*

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate], in respect of the Judicial Confession of the said *J K* [*or* of the Evidence adduced], find the Complaint proven [*or state to what Extent it is proven, or state any other Findings that may be considered necessary*], and ordain the said *J K* to [*here state the Matter required to be done*], under Certification that if, upon a Copy of this Judgment being served upon the said *J K* by an Officer of Court, he shall neglect or refuse to obey the same within the Period of after such Service, he shall be imprisoned for the Period of Days: Find the said *J K* liable in £ of Expenses to the Complainer; and failing immediate Payment thereof [*or if Time be allowed*, within Days from this Date, *say*] grant Warrant for Recovery of the said Sum by Poinding of his Goods and Effects, and

SCHEDULE (K) No. 7. Form of judgment and warrant *ad factum præstandum.*

summary Sale thereof, &c., [*as in No.* 4 *of this Schedule.*]

[*Signature of Judges or Judge.*]

Warrant of Imprisonment.

The Justice [*or* Sheriff, *or* Magistrate], in respect it is now proved to his Satisfaction that a Copy of the foregoing Judgment was duly served upon the within-named *J K*, upon the Day of , and that he has not as yet obeyed the Order therein contained, and that the Period appointed for Implement thereof is now expired, grants Warrant to apprehend the said *J K*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him for the Period of from the Date of his Imprisonment.

[*Signature of Judge.*]

[*Note.*—A Warrant Ad factum præstandum in the above Form may, if required by the Act, be combined with a Conviction or Judgment for a Penalty. Where Judgment is given for the Expenses of obtaining a Warrant ad factum præstandum recoverable by Poinding and Sale, and Imprisonment in default, the Proceedings shall be as nearly as possible in conformity with the Forms above prescribed for the Recovery of Penalties and Expenses. If the Expenses are declared to be recoverable by ordinary Diligence, or by Arrestment and Poinding, the Warrant and Procedure will be as in No. 6.]

8. *Judgment of Absolvitor or Dismissal.*

The Justices [*or* Justice, *or* Sheriff, *or* Magistrate] assoilzie the within-designed *J K* from the foregoing Complaint [*or* dismiss the Complaint]. [*If an Award of Expenses be competent,*[1] *add*], Find the within-designed *A B*, Complainer, liable to the

said *J K* in the Sum of £ of Expenses, and decern and ordain instant Execution therefor by Arrestment, and also Execution by Poinding and Sale, and Imprisonment if the same be competent, after a Charge of Fifteen free Days; grant Warrant, *&c.* [*as in No.* 6, *omitting Warrant of Imprisonment when incompetent.*]

SCHEDULE (K) No. 8. Form of judgment of absolvitor or dismissal.

[*Signature of Judges*[2] *or Judge.*]

[1] See section 22, and notes.
[2] See section 21, and form 2, note 6.

9. *Extract of Judgment convicting, absolving or dismissing* [*as the Case may be.*]

At the Day of in presence of . In the Complaint at the Instance of *A B* against *C D,* charging him with [*name the Crime, Offence, or Contravention*], as particularly set forth in said Complaint, the Justices [*or* Justice, *or* Sheriff, *or* Magistrate [in respect of [*state the Terms of the Judgment, and of any subsequent Warrant upon which Execution is to proceed*]. Extracted by me, Clerk of Court.

[*Signature of Clerk.*]

Execution may proceed either upon the Judgment and Warrant itself or upon an Extract in the above Form.

PART II.

CHAPTER I.

INTRODUCTORY.

IN this Part it is intended to describe procedure in processes of review in criminal causes before the High Court and Circuit Courts of Justiciary, and to give instances of the various grounds on which such processes are brought and entertained, and of the cases in which review has been held to be incompetent or excluded by statute.

The majority of cases brought under review of the Court of Justiciary are cases arising under penal statutes, each case depending to a greater or less extent on the provisions of the special statute. Those statutes are very numerous, and the procedure enjoined by them is by no means uniform, and often very complicated. In each case a careful examination of the statute is required; and often several clauses of the statute in question, and sometimes more than one statute, have to be read together. It is impossible, within the limits of this treatise, to do more than give instances which illustrate the construction of such statutes, and the procedure under them.[1]

The leading general Acts which regulate procedure in the inferior Courts are quoted partially or at length in Part I.; and it is hoped that that Part will be of some service as an easy means of reference in reading Part II.

Appeals to the Court of Justiciary in civil cases are not strictly within the scope of this treatise, but a short account of them will be given incidentally.

[1] See *supra*, pp. 127–130.

CHAPTER II.

The Constitution and Arrangements of the Court of Justiciary.

The Act 1672, cap. 16.

The Court of Justiciary was placed substantially upon its present footing by that part of the Act 1672, cap. 16, which is entituled, "Concerning the "Justice Court." It provides,[1] *inter alia*, "That "whereas formerlie Assessors from time to time "wer appointed to the Justice generall in matters "of importance, which being ambulatory, cannot be "soe convenient, as if all the members of that Court "wer settled and choysen by his Maiestie of fitt per-"sones who might make it their worke to make a just "and constant procedure in matters criminall:—

"1. For that effect that the office of Deputes in "the Justice-Court be suppressed, and that five of "the Lords of Session be joyned to the Justice-"Generall and Justice-Clerk, and all of them "invested with the same and equall power and "jurisdiction in all criminall causes.

"That the Justice-Generall being present, pre-"side, and in his absence the Justice-Clerk; and in "the absence of both, that these present elect one "of their number to preside, four of the whole "number being allwayes the quorum of that Court, "except at the Circuit Courts.

"2. That they be appointed to meit each Mon-"day at nine of the clocke in time of Session, and "oftner if business soe require.

* * * * * *

"5. That once a yeir in the moneth of Aprile or "May, Circuit Courts be keiped, two of their num-"ber appointed to goe and keep Courts at Dumfreis "and Jedburgh, two at Stirling, Glasgow, and Aire, "and other two at the tounes of Perth, Aberdein, "and Inuerness; the Justice-Generall being alwayes "super-numerary in anie of these Circuit Courts."

[1] Thomson's Acts, vol. viii. p. 87, No. 40.

THE ACT 1672, CAP. 16.

In reference to the reasons stated in the preamble for the reconstitution of the Justice-Court, it may be explained that until the date of the Commission of 11th January 1671, on which the Act 1672, cap. 16, was founded, the appointment of Justice-deputes stood on a very unsatisfactory footing. Power was usually bestowed upon the Justice-General of naming deputes; but the Crown retained and exercised the right of "appointing commissioners "for any special purpose, or naming deputes or "inferior Justices, as there might be occasion, who "should hold their office immediately of the Crown, "and not at the will of the Justiciar."[1]

Besides this the Privy Council were in the habit, on extraordinary occasions, of naming assessors to the Justice and his deputes, who seem to have exercised anything but a beneficial influence on the administration of justice.[2]

The Justice-General or "Justiciar" was at the date of the Act, and had been from remote times, the head of the Justice-Court, the work of which he conducted either personally or with the assistance of deputes named by himself or the Crown, or assessors appointed by the Privy Council. By 1 Will. IV., cap. 69, section 18, the office of Lord Justice-General was united to that of Lord President of the Court of Session; and by section 19 he was empowered to hold Circuit Courts "whether "any other Judge or Judges of the Court of Justici-"ary be or be not present." Previously, it was not competent for him to sit on Circuit alone or with one other Judge.[3] Until the date of the Act the Justice-General was not necessarily a lawyer; and in point of fact the office had been for long a sinecure.

Until the middle of the seventeenth century the

[1] Hume, ii. 14, 15; Mackenzie, tit. xv., p. 213.

[2] Hume, ii. 15.

[3] Hume, ii. 23; 1672, cap. 16, and Geo. II., cap. 43, sec. 32. The reason given by Hume is, "Because he, as President of the Court, and yet not "necessarily a lawyer, or versed in the course of criminal practice, would "otherwise, with his casting voice, have overruled the opinion of any other "of the Judges who happened to be his only colleague on a Circuit."

Justice-Clerk was simply Clerk to the Justice-Court or "Clarke of our Justiciarie-Generall," and was appointed by the Crown. The first step towards his exaltation was that he was repeatedly named *assessor* to the Justice or his deputies in difficult or important cases, on account no doubt of his superior acquaintance with criminal practice. In particular, Hume mentions two cases, in 1625 and 1633 respectively, in which this occurred.[1] The next step was to call him to the Bench. In an Act and warrant by the Privy Council, November 1663, appointing assessors in the case of George Graham on a charge of stealing certain deeds, "The Lord "Justice-Clerk" is named as one of the Bench to whom assessors are appointed; and his position was placed beyond doubt by a second Act of Council of 8th December 1663 in reference to the same case, in which it is declared "That the Lord Justice-Clerk "is one of the Judges of the Justice-" Court."[2]

THE LORD JUSTICE-CLERK.

Accordingly, in the Act 1672, cap. 16, he is recognised as one of the members of the Justice-Court, and next in authority to the Justice-General; and that position he has held ever since.

The Court of Justiciary sits either as the High Court or as the Circuit Court of Justiciary.

I. THE HIGH COURT OF JUSTICIARY.

Place of Sitting.—The place of meeting of the High Court has for a long period been fixed for Edinburgh in time of session, "by the circumstance "of the Judges being also Judges of the Court of "Session, which has its ordinary sittings there;" but there is nothing to hinder the Court from transferring their sittings to any other burgh or place in Scotland, should occasion require.[3]

[1] Hume, ii. 16.
[2] Hume, ii. 17; Mackenzie, tit. xv., p. 214.
[3] Hume, ii. 19. In 1720, by the King's desire, the Judges on the Northern and Southern Circuits, being more than a quorum of the whole Court, met at Cupar-Fife for the trial of rioters.

THE HIGH COURT OF JUSTICIARY.

Time of Sitting.—The time fixed by the Act of 1672 for meeting in time of session was each Monday at nine o'clock, and oftener if business required. The Court still meets every Monday during session, when the state of business requires it, but the hour of meeting at present is generally half-past ten A.M.

During vacation the Court sits at any time in the event of urgent business requiring that they should do so; but it is not often that this happens, usually only in the event of a panel running his letters. Many cases which might otherwise be brought to the High Court are sent to be tried, or are taken by appeal, to the Circuit Courts. If cases arise for trial within the three Lothians, or in Peeblesshire, in which the High Court has an exclusive jurisdiction, they are tried during session; and when advocations or suspensions are presented, which are only competent in the High Court, the bill is usually passed by a single Judge, and the hearing postponed till the beginning of next session.

Quorum.—By the Act 1672, *four* Judges were required for a quorum in the High Court.

By the Act 1681, cap. 22, *three* were declared sufficient in vacation; and by 23 Geo. III., cap. 45, that number were declared to be a quorum both during session and vacation.[1]

In regard to trials before the High Court, a further alteration was made by 31 and 32 Vict., cap. 95 (The Justiciary (Scotland) Act, 1868), section 1, by which it is provided that in "the trial of "any panel before the High Court," the Lord Justice-General, Lord Justice-Clerk, or any *one* Lord Commissioner of Justiciary, shall be a quorum, though two or more may competently sit. But when the High Court sits as a Court of review, *three* are still required for a quorum.

[1] Hume, ii. 19.

When questions of difficulty arise in the course of a trial before the High Court, or when in advocations or suspensions points of difficulty or importance are disclosed, it is competent for the Judge or Judges trying the case, or for the quorum hearing the advocation or suspension, to adjourn the case in order that the question may be heard and decided by a full Bench of Justiciary Judges. THE HIGH COURT OF JUSTICIARY.

Jurisdiction.—In regard to territory, the jurisdiction of the High Court, both as a Court of first instance, and as a Court of review, extends over the whole of Scotland. Cases arising for trial within the limits allocated to the Circuit Courts may be tried either before the High Court or Circuit Courts. The High Court has exclusive jurisdiction in the three Lothians and Peeblesshire, which are not within the limits of any of the Circuits; and, for reasons of convenience, prisoners are brought for trial to Edinburgh from the Stewartry of Orkney and Shetland.[1] The High Court is also often called upon to decide points arising in trials or appeals brought in the first instance before the Circuit Courts, and certified to the High Court by the Judge or Judges on the Circuit, on account of their difficulty or importance. Cases so certified are heard and determined by a quorum of the Court, or more commonly by a full Bench, or as many Judges as can attend.

In regard to the cases which may be brought before the High Court, either in the first instance or for review, it is sufficient to say at present that its jurisdiction in criminal matters is universal, except in so far as it is expressly excluded by statute. How far it is or can be so excluded will be considered hereafter.[2] It also possesses a limited statutory jurisdiction as a Court of review in civil cases.

[1] See *infra*, p. 160.

[2] It should be mentioned that the High Court cannot review the judgments of the Court of Session or of the Court of Justiciary, whether pronounced in the High Court or Circuit.

II. The Court of Justiciary on Circuit.

The Circuit Courts of Justiciary.

Places and Times for holding Circuit Courts.—The Act 1587, cap. 82, which speaks of the Justice-Ayre as an ancient institution which had fallen into disuse, provides for the holding of Justice-Ayres "as of old," *twice* in the year, in every shire of the kingdom, in the months of April and October, and directs that either the Justice-General or His Majesty should appoint eight deputies—two for each quarter of the kingdom.

The Act 1672, cap. 16, prescribes that Circuit Courts should be regularly held *once* in the year, in April or May; by two Judges at Dumfries or Jedburgh, for the South Circuit; by two at Stirling, Glasgow, and Ayr, for the West Circuit; and by two at Perth, Aberdeen, and Inverness, for the North Circuit. Those times and places were continued in the Commissions of 1675 and 1690.

No Circuits seem to have been held from the end of the reign of Charles II. till the year 1708. By the Act 6 Anne, cap. 6, sec. 4, passed shortly after the Union, it was directed that Circuit-Ayres should be held *twice* in the year, in April and May, and in October, at the afore-mentioned burghs.

By 10 Anne, cap. 33, the Autumn Circuit was dispensed with, except when it should please the Sovereign to issue a special order for holding it; but by 20 Geo. II., cap. 43, sec. 31, it was again directed that Circuit Courts should be held regularly *twice* in the year; and this has been done ever since. By the same Act, sec. 39, the shire of Argyle and the Western Isles were added to the West Circuit, and Inverary was named the Circuit town for the shires of Argyle and Bute.

By 21 Geo. II., cap. 19, the shire of Ayr was disjoined from the West and added to the South Circuit.

By 9 Geo. IV., cap. 29, sec. 1, provision was made for holding a Winter Circuit at Glasgow, in the end of December or beginning of January, once a year, "for the trying of criminal causes during "the recess of the Court of Session." It has been decided that the said Circuit is held for the disposal of criminal *trials* only, and that it is not competent to hear and dispose even of criminal appeals at it.[1]

THE CIRCUIT COURTS OF JUSTICIARY.

Times of holding Circuit Courts fixed by Act of Adjournal.—By 23 Geo. II., cap. 45, it is provided that the Lords of Justiciary shall, between the 1st and 20th days of March, and the 1st and 20th days of August in each year, determine by Act of Adjournal how long the Judges shall continue in each of the Circuit towns, it being provided that they shall remain at least three days in each Circuit town. By the Acts of Adjournal passed in pursuance of this enactment, the particular days of meeting for the Spring and Autumn Circuits are fixed, and two Judges are named for each Circuit; but by 9 Geo. IV., cap. 29, sec. 2, it is declared to be lawful for any Judge or Judges of Justiciary to discharge the duties of any Circuit Court, "notwithstanding such Judge or Judges "shall not have been specially named for that duty."

The Lords also appoint intimation to be made by the Clerk of Court of their having fixed the respective days and places of their sittings; and direct the Clerk to transmit to the respective Sheriffs and Stewards precepts ordaining publication to be made by them that the Circuits are to be held as arranged. They also authorise the Clerk to issue letters of diligence for citing accused parties and witnesses, and precepts for citing assizers.

Under the provisions of 9 Geo. IV., cap. 29, sec. 1, the time of meeting for the Winter Glasgow Circuit is fixed by Act of Adjournal, on or before the 20th of November in every year. The Act 2 Geo. IV., and 1 Will. IV., cap. 37, sec. 3, provides

[1] *Davidson* v. *Gray*, Glasgow, Jan. 6, 1844, 2 Broun, 9.

THE CIRCUIT COURTS OF JUSTICIARY.

that when a Winter Circuit is held at any town or burgh, the Spring Circuit shall not be held earlier than 20th April following; and accordingly the Glasgow Spring Circuit never commences before that day.

Allocation of shires and readjustment of Circuits.—By section 39 of the Jurisdictions Act, the Sovereign is empowered to make an allocation of the shires to the different Circuits by an order in Council.

By 9 Geo. IV., cap. 29, sec. 3, power is given to direct additional Courts to be held at any of the existing Circuit towns, or to dispense with existing Circuit Courts by order in Council; and by 27 Vict., cap. 30, sec. 1, the Sovereign is empowered to form new Circuits in the same way, or to alter the limits of existing Courts.

Present arrangement of Circuits.—Passing over without special notice one or two alterations in the adjustment of the Circuits, other than those already mentioned, the following are the towns at which Circuit Courts are at present held, and the shires which they respectively represent:—

THE SOUTH CIRCUIT—

Ayr, for the shire of Ayr.

Dumfries, for the shires of Dumfries and Wigtown, and the stewartry of Kirkcudbright.

Jedburgh,[1] for the shires of Roxburgh, Berwick and Selkirk.

THE WEST CIRCUIT—

Stirling, for the shires of Stirling, Dumbarton, Clackmannan and Kinross.

Inverary, for the shires of Argyll and Bute.

Glasgow,[2] for the shires of Lanark and Renfrew.

[1] Previously to the passing of the Act 39 and 40 Vict., cap. 152, cases from Peeblesshire were tried or heard on appeal on Circuit at Jedburgh.

[2] A Winter Circuit is held every year at Glasgow. See *supra*, p. 158.

THE CIRCUIT COURTS OF JUSTICIARY.

THE NORTH CIRCUIT—

Dundee,[1] for the shire of Forfar.

Perth, for the shires of Perth and Fife.

Aberdeen, for the shires of Aberdeen, Banff and Kincardine.

Inverness, for the shires of Inverness, Ross, Elgin, Nairn, Cromarty, Sutherland, Caithness, and the shire and stewartry of Orkney and Shetland.[2]

Cases from the three Lothians, viz., the shires of Edinburgh, Haddington and Linlithgow, and from the shire of Peebles, are taken to the High Court. Cases for trial from the stewartry of Orkney and Shetland are taken to the High Court in Edinburgh, not because the High Court has any exclusive jurisdiction in cases from the stewartry, but on account of the difficulty of conveying prisoners and jurymen to Inverness, communication with Edinburgh being more direct. But an appeal from the Small-Debt Court of Shetland at Lerwick was held to be competently presented to the Circuit Court at Inverness.[3]

Quorum.—It will be remembered that it is directed by the Act 1672, cap. 16, that two Jndges be appointed for each of the three Circuits. It being doubted whether the presence of both Judges was absolutely essential to the valid discharge of business, it was provided by 20 Geo. II., cap. 43, sec. 32, that either of the two Judges might proceed to business in the absence of his colleague "through "indisposition or other necessary avocation," unless the Lord Justice-General was present.[4]

[1] Dundee was made a Circuit town by an order in Council, dated 30th November 1864.

[2] Although the stewartry is named in the Act of Adjournal as belonging to the Inverness Circuit, no prisoners are tried there, and no jurors are cited to attend. See the case of *Walker* v. *Moar*, *infra*.

[3] *Walker* v. *Moar*, Inverness, Sept. 15, 1870, 1 Couper, 466.

[4] Until 1830 the Lord Justice-General could not hold a Circuit Court alone or with one other Judge (Hume, ii. 23). By 2 Geo. IV., and 1 Will. IV., cap. 69, sec. 19, he is empowered to do so; but except in the case of one of the other Judges being unable to attend, he does not go on Circuit, the work being left to the Lord Justice-Clerk and five Lords Commissioners of Justiciary. See *supra*, p. 153, note 3.

THE CIRCUIT COURTS OF JUSTICIARY.

By 11 and 12 Vict., cap. 79, sec. 8, two Judges are empowered to sit in separate Courts simultaneously at the Glasgow Circuits, for the more rapid dispatch of business; and this power is extended to the dispatch of business at the other Circuit towns by 31 and 32 Vict., cap. 95 (The Justiciary (Scotland) Act 1868), sec. 2. By sec. 3 of the last-named Act it is provided, to meet the event of business at a Circuit town not having been disposed of by the time fixed for meeting at the next Circuit town, that it shall be competent for one of the Judges to proceed to the next Circuit town and open the Court and dispatch business there, notwithstanding the continuance of the sitting of his colleague at the other town.[1]

When two Judges are present at a Circuit town, one sometimes hears and decides appeals, while the other disposes of the criminal trials; and when there is little business set down for a Circuit town it is not unusual for one Judge to go there and hold the Court alone. Owing to practical difficulties,—for instance the want of accommodation for a second Court, and the necessity of sending a second advocate-depute to prosecute,—the Judges seldom sit simultaneously in separate Courts for the disposal of criminal trials, except at Glasgow.

Jurisdiction.—The jurisdiction of the Circuit Courts as Courts of first instance is confined to offences actually or constructively committed within the territory allocated to them; and to cases in which, although the offence may have been committed beyond those limits, power is given by statute to try them before the Circuit Court as being the *forum deprehensionis.*

The powers of the Circuit Courts as Courts of review are limited and defined by statute; in particu-

[1] This removes doubts which had been felt previously as to the competency of doing so. See Bell's Notes to Hume, ii. p. 144, and the case of *Harris Rosenberg*, H. C., June 13, 1842, 1 Broun, 367, per Lord Moncreiff, p. 368.

lar, by the Heritable Jurisdictions Act.[1] Within the limits and subject to a strict observance of the procedure prescribed in that Act or in special Acts, giving a power of appeal to Circuit, the Circuit Courts possess the same powers as the High Court.[2] Beyond those statutory limits they have no powers as Courts of review. The processes of advocation and suspension are not competent before them; and they do not possess that supereminent power of granting redress against abuses in inferior Courts without right regard to times and forms, and of providing a remedy for any extraordinary or unforeseen occurrence in criminal matters, which is the distinctive prerogative of the High Court.

THE CIRCUIT COURTS OF JUSTICIARY.

The cases which may be competently brought under review of the Circuit Courts, and the appropriate procedure, will be considered hereafter.

[1] 20 Geo. II., cap. 43, sec. 34.

[2] See opinion of Lord Deas in *Rhodes* v. *Ross*, Stirling, Sept. 23, 1870, 1 Couper, 469, 1st point.

CHAPTER III.

The High Court of Justiciary as a Court of Review, and the Processes of Review competent before it.

The powers of the High Court as a Court of review are derived for the most part from the common law, but to a certain extent they depend on statute.

At common law the High Court possesses the power of reviewing, in the widest sense of the word, the proceedings of all the inferior Courts in Scotland in criminal matters. Its jurisdiction may be and is often limited or excluded by statute; but such limitation or exclusion must be explicit, and is only effectual as to proceedings competently taken under such statutes.

The statutory jurisdiction of the High Court in criminal matters is usually accompanied by a limitation of its common law powers.

The High Court has also a limited statutory jurisdiction as a Court of review in civil matters.[1]

It cannot review judgments or sentences of the Court of Justiciary, whether pronounced in the High Court or on Circuit; neither can it review the proceedings of the Court of Session in its criminal capacity.[2]

The following are the processes of review at present competent before the High Court of

[1] Under the Small Debt Act, 1837, 1 Vict., cap. 41, sec. 31.
[2] Alison, ii. 25.

Justiciary. The processes of advocation and suspension are common law remedies, the rest are statutory.

SECTION I.

Advocation.

Advocation, which is literally the calling up or removal of a cause from an inferior to a superior Court, seems to have been originally not strictly speaking a process of review, but a removal of the cause at its commencement or during its course, on account of some objection to the jurisdiction of the inferior Judge, or on account of partiality or incapacity on his part, in order to its being proceeded with before the superior Court, or before some other tribunal or Judge. The following reasons of advocation given by Sir George Mackenzie[1] show the nature of the process in his time :—

1. Consanguinity of the Judge to one of the parties.
2. One of the members of the Court being a party.
3. The Judge being suspect, as when he gave partial counsel or repelled a just defence.
4. Incompetency; that is, the case not being proper for the inferior Judge's Court.
5. The intricacy of the case.

By degrees advocation came to be used also as a mode of review; as such it is strictly speaking the appropriate remedy for errors committed in the course and during the dependence of the trial or criminal process, and before final judgment or

[1] Mackenzie, tit. xvii., sec. 4, pp. 219, 220.

ADVOCATION, WHEN COMPETENT.

sentence.[1] For a long period, however, advocation has been held competent, "without regard to the "point whether it was at the close or during the "course of the proceedings that the remedy has "been sought;"[2] and indeed in modern times it has been more frequently used and sustained after than before final judgment. It is not on every ground that the Court will interfere with an inferior Judge or review his interlocutors *pendente processu,* and it is contrary to the spirit of criminal procedure (which requires continuity and dispatch) that they should do so. Accordingly the Court dismissed as incompetent an advocation presented between the first and second diets of a jury cause, in which it was sought to submit to review an interlocutor of the Sheriff finding the libel relevant.[3] Lord Justice-Clerk Hope said (2 Irv. 275), "I do not mean to enter on the "question whether such extreme cases may not "occur as may induce this Court to stop an inferior "Judge from proceeding with a cause pending "before him. But I must say that the notion of "stopping, in the manner here attempted, a criminal "trial before the Sheriff, between the interlocutor "of relevancy and the next diet of the cause, "appears to me most extraordinary. This Court "is not to try the cause, but we are asked to pro-"hibit the Sheriff from going on with it. I cannot "countenance such a proceeding.

"The interval allowed by the new Sheriff Court "Act seems to render this proceeding still more "strange; particularly in those numerous cases "where it is most important that the trial and "conviction should be summary. Were the pro-"cedure here attempted found competent, we "should have advocations in the great majority of "such cases, and great delay of justice would be the

[1] Alison, ii. 26, and *List* v. *Pirrie*, H. C., Dec. 24, 1867, 5 Irv. 559, per Lord Justice-Clerk.
[2] Alison, ii. 26.
[3] *Jameson* v. *Lothian*, H. C., December 3, 1855, 2 Irv. 273.

"result. I repeat that I give no opinion as to "what might be done in any extraordinary case "which outraged all the principles of the liberty "of the subject."

ADVOCATION, WHEN COMPETENT.

Again the same course was followed in *List* v. *Pirrie*.[1] The respondent Pirrie was convicted by the Justices of the Peace in Petty Sessions, and sentenced to six weeks imprisonment. On his appealing to Quarter Sessions, the prosecutor, List, objected to the competency of the appeal. The Justices, however, sustained the competency of the appeal, but adjourned the hearing of the cause in order to give List an opportunity of bringing their interlocutor under review of the High Court. He accordingly presented a bill of advocation; but the Court, in absence of the respondent, refused it as incompetent "without prejudice to any questions "as to the competency of the respondent's appeal "to Quarter Sessions."

In both of those cases the Court, while declining to interfere *pendente processu*, reserved power to decide on the objections stated if brought before them after final judgment or sentence.

Advocation is the appropriate mode of bringing under review a judgment of *absolvitor* or dismissal,[2] or a judgment which does not award expenses to the advocator[3] (where expenses may competently be given), or otherwise fails to give him the decree to which he conceives himself entitled. Unless combined with suspension it is not properly applicable to sentences or judgments *condemnator*, this being the province of suspension. Accordingly it is more frequently used by the prosecutor than by the accused.

It is sometimes used in combination with suspension (under the name of advocation and sus-

[1] H. C., Dec. 24, 1867, 5 Irv. 559.

[2] *Earl of Kinnoull* v. *Tod*, H. C., Dec. 15, 1859, 3 Irv. 501; *Caledonian Railway Company* v. *Fleming*, H. C., Feb. 20, 1869, 1 Couper, 193,

[3] *Prentice and Newbigging* v. *Bathgate*, H. C., June 19, 1843, 1 Broun, 561.

PROCEDURE IN ADVOCATIONS.

pension) in bringing warrants, sentences, or judgments *condemnator* under review; but in such cases advocation seems to be superfluous, the whole case being brought up by bill of suspension.

Advocation is not much used now,[1] suspension or appeal under the Act of 1875 being adopted in preference. It has therefore been thought better to give merely a short account of the process, as the procedure, which is substantially the same as in suspensions, will be described more fully under the latter head.

The older form of the process of Advocation.—Previously to the year 1671, and indeed for some years later,[2] the case was introduced into the superior Court, not on the authority of the Justice, but of the Privy Council or the Lords of Session, who, on a bill of advocation being presented to them, ordered intimation enjoining the inferior Judge not to proceed, and granted warrant for raising letters of advocation under the signet of the Privy Council or of the Court of Session, as the case might be. On the letters being raised, the complainer, if his crime were bailable, found caution to appear and insist in the advocation on a certain day, and was thereupon liberated. He at the same time gave the prosecutor a charge to appear at the diet and bring the proceedings with him; and sometimes a charge to the like effect was given to the Judge and Clerk of the inferior Court. It is unnecessary here to give further particulars of the older process of advocation, as it has been much shortened in modern practice.

Soon after the Revolution (1688) the Court of Session seem to have surrendered to the Court of Justiciary the right of dealing with bills of advocation in criminal causes, and this right the latter have exercised exclusively ever since.

[1] It is believed that there has not been an advocation before the High Court of Justiciary since 1869.

[2] Hume (ii. 510, note 2), mentions an advocation proceeding on a bill to the Court of Session in 1675.

The modern form of the process of Advocation.—Advocation is competent only before the High Court of Justiciary. Except under remit from the High Court, the Circuit Courts have no jurisdiction in advocations. PROCEDURE IN ADVOCATIONS.

The first step in the process is a bill of advocation addressed to "The Lord Justice-General, The "Lord Justice-Clerk, and Lords Commissioners of "the High Court of Justiciary." It should contain a succinct statement of the proceedings in the inferior Court, the reasons of advocation, and a prayer for letters of advocation, and transmission of the proceedings in the inferior Court to the Clerk of Justiciary. The form of the bill is more fully considered hereafter under the head of Suspension.[1]

The bill is lodged with the Clerk of Justiciary at the Justiciary Office in the Register House, Edinburgh.[2] The clerk immediately lays it before one of the Justiciary Judges. A single Judge is competent to pass but not to refuse a bill of advocation, a quorum (three) being required for that purpose.[3]

Although prayed for, letters of advocation are not in use to be expede, the whole merits of the case being debated and finally discussed upon the bill. The Judge's deliverance usually orders service of the bill, and the deliverance thereon, on the

[1] See *postea*, p. 174, *et seq.*

[2] See table of fees at present in force in the Appendix.

[3] Baron Hume seems to use the expression "passing the bill" in a double sense. He says first (ii. 512) that "a single Judge is competent to pass the "bill." . . . "The same rule, however, does not apply to the discuss-"ing of the reasons of advocation on the bill, which is an ultimate trial of "the cause, and can only take place before a quorum of the Court." Here by "passing the bill" he plainly means pronouncing the first interlocutor. Again, in speaking of the final disposal of the reasons of advocation, he says (ii. 512), "After removal of the process *by passing the bill*, the condi-"tion of things is thus far altered that the presence of both parties be-"comes equally indispensable as if the prosecution had been in the superior "Court from the beginning. They have to find surety *de novo*," &c. Here "passing the bill" is evidently used as equivalent to "disposing of the "reasons of advocation;" and accordingly the expression "pass the bill" is often to be found in the final interlocutor, both in advocations and suspensions. In practice a single Judge never disposes finally of the reasons of advocation.

PROCEDURE IN ADVOCATIONS.

respondent, and transmission of the proceedings to the Clerk of Justiciary, and appoints the case to be heard on a day which is usually left blank.[1] Sometimes, but not often, answers are ordered to be lodged by a certain day.

The interlocutors pronounced in the process, and the certificates of service or intimation, are written on the bill itself, which therefore constitutes the record of the proceedings.

If a day for the hearing is not named in the first interlocutor, a day is fixed by the Judge who is to preside at the hearing, on the application of the Clerk of Justiciary.

A quorum (of three) is still required for the disposal by the High Court of advocations, suspensions, and appeals, the provision in sec. 1 of the Justiciary Act of 1868, authorising a single Judge to preside and constitute a quorum, being confined to criminal *trials*.

Except in one event, the personal presence of the parties is not required during the discussion of the reasons of advocation. By the Act of 1875 it is enacted that if the complainer has been sentenced to a term of imprisonment, and has been liberated on caution, he must appear personally at the hearing and disposal of the bill, under penalty of being held to have abandoned it;[2] but in other cases he need not do so.

Parties are usually heard orally on the bill and answers, if there are any, and counsel address the Court in the order observed in civil cases; but the Court sometimes, in cases of difficulty, order minutes of debate.

[1] INTERLOCUTOR.—In the Bill of Advocation, A B *v* C D.

Edinburgh [*Date.*]

Lord , one of the Lords Commissioners of Justiciary, having considered this bill, grants warrant for serving a copy thereof and of this deliverance on the therein named C D, Respondent; and further grants warrant for and ordains transmission of the proceedings complained of to the Clerk of Justiciary, and appoints the case to be heard on the day of . [*Signature of Judge.*]

[2] 38 and 39 Vict., cap. 62, sec. 10, quoted *infra*, p. 178, note 2.

The Court may pass or refuse the bill, or they may pass it in part, and refuse it in part; or instead of passing the bill, they may remit the process to the inferior Judge, with instructions how to proceed.[1] There have been cases in which the bill has been passed to the effect of trying the cause at the next Circuit Court for the district;[2] but this course is now unknown in practice.

Disposal of Bill of Advocation.

The form of the final interlocutor varies. Sometimes the Court "pass the bill," and sometimes these words are omitted. Until within the last twenty or thirty years, if the Court sustained the reasons of advocation, the interlocutor contained the words "Advocate the cause;" but these words have latterly been omitted. When an advocation has been brought at the beginning or in the course of a process, and the Court decide that further procedure shall take place before themselves, instead of the case being remitted to the inferior Court, the presence of both parties "becomes equally indis-"pensable as if the prosecution had been in the "superior Court from the beginning."[3]

In dealing with expenses the Court usually dispense with taxation, and modify them at once. But if the procedure has been prolonged, a remit is made to the Clerk of Court to tax and report upon the successful party's account of expenses. On the question of expenses see *infra*, p. 181, *et seq.*, and *supra*, pp. 104, 105.

SECTION II.

Suspension, and Suspension and Liberation.

Suspension is the appropriate mode of bringing

[1] See *Caledonian Railway Co.* v. *Fleming*, H. C., Feb. 20, 1869, 1 Couper, 193.

[2] Hume (ii. 512) mentions two cases, both in the year 1711, in which this course was followed.

[3] Hume, ii. 511.

SUSPENSION, WHEN COMPETENT.

under review of the High Court an illegal or irregular warrant, conviction, or judgment of an inferior Court.

It is competent only before the High Court. The procedure is by bill of suspension. The party who presents the bill is called the complainer or suspender; and the party upon or to whom service or intimation is asked is called the respondent. If the complainer is in prison and prays for liberation, the bill is called a bill of suspension and liberation.

To render suspension competent, there must be a warrant, judgment, or conviction to suspend actually in existence and professedly complete. Suspension of a threatened or expected warrant or judgment is incompetent.[1]

Again, it is not *per se* a relevant objection to suspension that the warrant complained of has been executed,[2] or that the sentence or judgment has been undergone, or implemented in whole or in part, as by undergoing a sentence of imprisonment,[3] or paying a fine or penalty.[4] Where a gross radical error has been committed, mere acquiescence on the part of the accused has been repeatedly held not to bar suspension;[5] but the Court have in several cases refused suspension where there had been great delay in bringing the process not satisfactorily explained.[6]

The reason of this peculiarity in criminal suspensions is thus stated by Lord Justice-Clerk Hope

[1] *Jupp* v. *Dunbar*, H. C., March 9, 1863, 4 Irv. 355.

[2] *Bell* v. *Black and Morrison*, H. C., Jan. 30, 1865, 5 Irv. 57.

[3] Alison, ii. 31. In *Russell* v. *Colquhoun*, H. C., Nov. 24, 1845, 2 Broun, 572, the whole term of imprisonment was undergone.

[4] *Gillies* v. *Jeffrey*, H. C., Dec. 4, 1839, 2 Swin. 454; *Christie* v. *Adamson*, Perth, Oct. 1, 1853, 1 Irv. 293.

[5] *Russell* v. *Colquhoun, supra; Duncan* v. *Ramsay*, Aberdeen, April 15, 1853, 1 Irv. 208; *Hood* v. *Young*, H. C., June 10, 1853, 1 Irv. 236; *Jamieson* v. *Pilmer*, H. C., June 2, 1848, J. Shaw, 238; *French and Others* v. *Smith*, H. C., June 26, 1855, 2 Irv. 198.

[6] In *Skinner* v. *Adamson*, H. C., March 12, 1842, 1 Broun, 67, there was a delay of 12 months; in *Russel* v. *Sprot and Lang*, H. C., Jan. 25, 1845, 2 Broun, 385, there was a delay of about 5 months. In both cases the bill was refused.

in *Russell* v. *Colquhoun*:[1] "In the forms of the "Justiciary Court reduction is unknown, and on "that very account suspension is the competent "remedy for getting rid of and clearing away every "illegal sentence. Is the sentence less illegal be-"cause it has been suffered than it was previously? "The end and object of a process of suspension "and liberation is not merely to procure to the "suspender freedom from imprisonment, but to re-"scind and annul the unlawful sentence of which "he complains." Another reason which may be added is, that criminal proceedings are often summary, and the warrant or sentence may be executed before any steps can be taken to suspend.

SUSPENSION, WHEN COMPETENT.

There are two cases, both connected with trial by jury, which constitute important limitations of the otherwise wide remedy of suspension:—

First, A conviction following on the verdict of an assize cannot be reviewed *on the merits.* In a criminal trial the verdict of a jury cannot be set aside as in a civil case, on the ground of its being contrary to evidence.[2] But this does not prevent a conviction and sentence so obtained being reviewed on other grounds which do not involve reconsideration of the merits. If the libel is irrelevant,[3] or if incompetent evidence has been admitted,[4] or competent evidence rejected,[5] or if irregularities have been committed by the assize,[6] whether such irregularities are due to the fault of the assize, or to want of care on the part of the Judge or officers of Court,[7] or if the verdict itself is faulty or incomplete,[8] the conviction will be set aside.

[1] 2 Broun, 579.
[2] Alison, ii. 28.
[3] *Anderson* v. *Blair*, H. C., Jan. 14, 1861, 4 Irv. 5; *Clendinnen* v. *Rodger*, H. C., Dec. 2, 1875, 3 Rettie, Justiciary Cases, 3.
[4] *Burns* v. *Hart and Young*, H. C., Dec. 19, 1856, 2 Irv. 571.
[5] Hume, ii. 514; Alison, ii. 29.
[6] Alison, ii. 31.
[7] *M'Garth and Others* v. *Bathgate*, H. C., May 14 and 15, 1869, 1 Couper, 260.
[8] *Graham* v. *Toderick*. H. C., May 21, 1864, 4 Irv. 504; *Gray* v. *Mackenzie*, H. C., Feb. 24, 1862, 4 Irv. 166; *Milne* v. *Simpson*, Aberdeen, April 28, 1874, 2 Couper, 562.

SUSPENSION, WHEN COMPETENT.

Secondly, It has also been held that the Court cannot entertain a suspension brought on the ground that the Judge laid down bad law in his charge to the jury. This was decided in *Quarns* v. *Hart.*[1] In the course of the trial before a Sheriff and jury of a person accused of the crime of reset of theft, the Sheriff in his charge told the jury that a previous conviction of the same crime was a strong circumstance against the accused, and quoted Hume, i. 114, in support of this statement of the law. The accused's agent took exception to this part of the charge, and asked the Sheriff to note the exception, but he refused to do so. A conviction having followed, Quarns brought a suspension on the ground that the Sheriff had laid down bad law. Founding on the Act of Adjournal of 17th March 1827, ch. v. sec. 1,[2] he pleaded that the Sheriff was bound to note the exception taken to his charge, and asked the Court to allow him a proof of his averments as to the terms of the charge and as to what took place in the inferior Court. The Court refused the suspension as incompetent in respect that such a proceeding was unprecedented; that the Sheriff was not bound to keep a note of his charge or of exceptions to it; and that therefore the Court had no satisfactory means of ascertaining what law he had laid down. Lord Neaves said (p. 258), "I have never heard of a case "where what is now proposed was done; and if, at "this time of day, a thing is unknown in our "criminal practice, it is pretty sure to be incon-"sistent with law."

It would be a misfortune, no doubt, to do anything to cause unnecessary delay and expense in our criminal procedure; but, as Lord Neaves observed in *Quarns* v. *Hart,*[3] it cannot be disguised

[1] *Quarns* v. *Hart,* H. C., June 4, 1866, 5 Irv. 251; and Alison, ii. 679, 680.
[2] See p. 12, *supra.*
[3] 5 Irv. 257.

that great harm may be done by a Judge laying down bad law in a charge to the jury; as much, at least, as by improperly admitting or rejecting evidence. If the Act of 1875,[1] which deals only with summary causes, is supplemented or amended, it will be for consideration whether some machinery may not be provided for recording exceptions to the Judge's charge. There is no reason why the same Judge's law should be exposed to review in summary cases, and be exempt from it in trials by jury. Besides, review on this ground would involve no interference with the province of the jury, because the law is the Sheriff's domain, and the jury are bound to take it from him. A fresh enactment might be made at the same time, with advantage, in regard to noting objections arising in the course of trials by jury, as the only existing regulation on the subject is inapplicable to the present form of process. The Act of Adjournal of 17th March 1827, ch. 5, sec. 1, directs that such objections and the answers shall be "entered on the record,"[2] but now that the evidence is not taken down *ad longum*, the record is not the proper place for such entries. The Sheriff, who now is bound to take and authenticate notes of the evidence,[3] should be directed also to note objections stated in the course of the proceedings.

SUSPENSION, WHEN COMPETENT.

It has been thought advisable to postpone consideration of the various grounds on which suspension is entertained, and of the cases in which it has been held to be excluded by statute or barred by the actings of the party complaining, until some account has been given of the processes of review in the High Court and Circuit Courts.

Procedure in Suspensions—A Bill of Suspension and Liberation.—For the sake of illustration take the

[1] 38 and 39 Vict., cap. 62.
[2] See *supra*, pp. 12, 31.
[3] By 9 Geo. IV., cap. 29, sec. 17, quoted *supra*, p. 17; perhaps by implication this enactment involves noting objections which arise in the course of the evidence, but an express direction would be better.

PROCEDURE IN SUSPENSIONS.

Form of the bill.

common case of a party applying for suspension of a conviction and sentence of imprisonment and for liberation: The process begins with a bill addressed to "The Lord Justice-General, the Lord Justice-"Clerk, and the Lords Commissioners of Justiciary." There is no obligatory or statutory form for the bill; sometimes it is drawn in the form of a petition, which is not divided into articles and pleas, and concludes with a prayer. Of late years the form most commonly adopted has been modelled on that prescribed for civil processes of suspension. It consists of an abbreviated petition and prayer, with an articulate statement of facts and pleas in law annexed. The petition states shortly that the suspender is under the necessity of applying for suspension of a pretended conviction, giving the date and place of the conviction, the process in which and the Judge or Judges by whom it was pronounced, the purport of the conviction, and the sentence pronounced; that in pursuance of the said sentence the suspender has been imprisoned, giving the name of the prison; that the said conviction and sentence are illegal and unwarrantable, as will appear from the annexed statement of facts and pleas in law, and should be suspended, and that liberation should be granted as prayed for; that the suspender is desirous of obtaining interim liberation; and that he is prepared if necessary to find caution in common form.

Then follows the prayer, which is much the same, *mutatis mutandis,* as in advocation. It prays for service on the respondent, who is usually the prosecutor or complainer in the inferior Court, and sometimes for answers; for transmission of the proceedings to the Clerk of Justiciary; that the conviction complained of should be suspended *simpliciter,* and the suspender set at liberty; that the suspender be found entitled to expenses; and that in the meantime interim liberation be granted, with

or without caution; or to do otherwise as shall seem just.

PROCEDURE IN SUSPENSIONS.

Form of the bill.

As the bill is often the only paper in the hands of the Judges who decide the case, the statement of facts should be complete in every essential particular. If, for instance, there is an objection to the relevancy of the complaint, the *ipsissima verba* of the complaint, or at least of the passage which contains the alleged defect, should be given. If the suspension turns on the construction of an Act of Parliament, the necessary sections should be quoted. If the terms of the conviction are impugned, it should be quoted at length. In other respects the statement should be concise and devoid of argument; but the facts of the case, and the various steps of procedure, with their dates, should be correctly set forth. Special care should be taken in stating the reasons of suspension and pleas in law. The Court do not usually tie the suspender down very strictly to the reasons stated, but they sometimes do so, and do not allow a ground of suspension not contained in the bill to be stated and argued at the bar;[1] the more so if it is founded on *facts* not previously condescended on. It is scarcely necessary to observe, however, that it is bad policy as well as bad pleading to load the bill with frivolous or untenable pleas. Not to mention the prejudicial effect of such pleading on the minds of the Judges, expenses may be refused or modified on this ground.[2] Lastly, all solid and maintainable objections should be stated, even although they may not have been urged in the inferior Court. It is only in circumstances amounting to deliberate acquiescence on the part of the suspender that the Court refuse to listen to substantial objections because they are stated for the first time before them.

This is a sketch of a bill of suspension in an

[1] *Maclean* v. *Macfarlane*, H. C., March 9, 1863, 4 Irv. 351.
[2] *Ferguson* v. *Thow*, H. C., June 30, 1862, 4 Irv. 198.

PROCEDURE IN SUSPENSIONS.

ordinary case; but each case depends on its own circumstances, and the model given must be expanded or curtailed to suit the facts.

Form of the bill.

The bill need not be signed by counsel; it is usually signed by the appellant's agent. It is then lodged with the Clerk of Justiciary at the Justiciary Office.[1] The Clerk immediately lays it before one of the Justiciary Judges, who, unless there is anything palpably untenable on the face of the bill, pronounces an interlocutor granting warrant for serving a copy of the bill, and his deliverance thereon, on the respondent, and appointing the case to be heard on a day which is usually left blank.[2] This and all the other interlocutors in the case, together with the certificates of service or intimation, are written on the bill, which thus forms the record.

If the suspender is in prison under the sentence complained of, and has applied for interim liberation on caution, the Judge, if he thinks fit, grants warrant for interim liberation on caution being found, in one or other of the forms given in the note,[2]

[1] The hours of the Justiciary Office are 10 A.M. to 3 P.M. (on Saturdays from 10 A.M to 1 P.M.) at the Old Register Office, Edinburgh, except during trials before the High Court, when the officials will be found in the Parliament House. There are no holidays, and the clerk can be called upon at any time to discharge his duties, Sundays not excepted. No bill of suspension or advocation, and no appeal, is received until the appropriate fee is paid. See table of fees at present in force in the Appendix.

[2] INTERLOCUTOR.—Lord N , one of the Lords Commissioners of Justiciary, having considered the foregoing bill, grants warrant for serving a copy thereof and of this deliverance on the therein named [*design the respondent*], and for transmission of the proceedings to the Clerk of Justiciary, and appoints the case to be heard on the day of *

[Signed] C N.

*1.

[*If the suspender is in prison for non-payment of a fine, add*] Meantime grants warrant for the liberation of the suspender [*or* complainer] on his finding caution in the [*describe the books*] Court Books of [*give the name of the Court*], that he shall pay the fine and expenses awarded against him in the conviction complained of, in the event of this bill being ultimately refused.

*2.

[*If the suspender has been sentenced to imprisonment without the alternative of a fine, add*] Meantime grants warrant for the liberation of the suspender [*or* complainer] on his finding caution in the [*describe the books*] Court Books of [*give the name of the Court*], that he shall return to prison and there undergo the remainder of the sentence complained of, in the event of this bill being refused; and that under penalty of £ sterling.

according as the suspender has been imprisoned, with or without the alternative of a fine.

PROCEDURE IN SUSPENSIONS.

The suspender is not entitled to interim liberation as a matter of right, as there is a conviction standing against him;[1] but it is usually granted on caution, unless there is anything on the face of the bill or otherwise brought to the Judge's knowledge to lead him to refuse it; or unless the case is to be immediately heard and disposed of. A copy of the usual bond of caution is printed in the Appendix. The reputed sufficiency of the cautioner must be certified by a Justice of the Peace in writing on the bond.

Interim liberation.

Procedure at the hearing.—A day for the hearing is fixed, on the application of the parties, or either of them, by signed memorandum.[2] If no appearance is made for the suspender the suspension is refused, with expenses.

If the suspender has obtained *interim* liberation, he must appear *personally* at the hearing and disposal of the case, under penalty of being held to have abandoned his suspension; and if he is absent the Court may issue a warrant for his apprehension and imprisonment during the period of his sentence which remains unexpired.[3] This was enacted in order to put some check upon convicted persons, and prevent them from absconding, as they sometimes did, on obtaining liberation. Previously it was not the practice of the Court of Justiciary to

[1] Alison, ii. 31.

[2] See *infra*, p. 188.

[3] 38 and 39 Vict., c. 62, sec. 10.—"Where a person sentenced to a term of "imprisonment by an inferior Judge shall bring an appeal, suspension, or "other process of review, of the sentence under which he is imprisoned, "and thereupon have interim liberation granted to him, such person shall "appear personally in the Court before which such appeal, suspension, or "other process as aforesaid shall be brought on the day or days fixed for "the hearing and disposal of the same; failing which, he shall be held to "have abandoned the same, and the said Court shall thereon, and shall "also in all other cases, in disposing of any appeal, suspension, or other "process as aforesaid, have power to grant warrants to apprehend and "imprison such person for any term, to run from the date of his apprehension, not longer than the period which at the date of his liberation "remained unexpired of the term of imprisonment specified in the sentence "brought under review."

PROCEDURE IN SUSPENSIONS.

grant warrant for the apprehension and reimprisonment of the complainer. The respondent was left to proceed in the inferior Court on the original warrant.[1]

Disposal of the case.

If no appearance is made for the respondent, the suspender must still satisfy the Court that the conviction complained of should be set aside.

The case is heard and disposed of by a quorum (three or more) of the Court.[2] The Lord Justice-General presides, and in his absence the Lord Justice-Clerk; and in the absence of both, the senior Judge present. The pleadings are usually oral, and the same order is followed in addressing the Court as in civil cases, notwithstanding that in almost all criminal trials the accused has the last word in all discussions.[3] Sometimes in cases of difficulty the Court order informations; and sometimes after hearing parties they order the respondent to lodge answers, if this has not already been done.[4]

Disposal of the case.—The Court may refuse the suspension, or pass the bill and suspend the proceedings complained of *simpliciter*. They may also amend, vary, or alter the sentence in any way they think fit;[5] they may suspend it in part and sustain it in part, but this can only be done where the good and bad portions are distinctly separable. In *Snaddon* v. *Spence*,[6] the Justices in Petty Sessions convicted the suspender, Snaddon, of an offence under the Day Trespass Act, 3 Will. IV., cap. 68. On appeal, the Justices in Quarter Sessions affirmed this conviction, and found Snaddon liable in the expenses of the appeal, and in default of payment adjudged him to be imprisoned for 3 weeks. Snaddon brought a suspension, one ground of suspension

[1] *Lawson* v. *Mackenzie*, H. C., Dec. 3, 1855, 2 Irv. 272.
[2] *Supra*, pp. 155, 156.
[3] "That in all criminal persuits the defender or his advocats be always "the last speaker, except in cases of treason and rebellion against the "King."—1672, cap. 16, regulation 10.
[4] *Walker* v. *Lang*, 5 Irv. 510.
[5] Alison, ii. 32.
[6] *Snaddon* v. *Spence*, H. C., June 30, 1862, 4 Irv. 200, last point.

being that the Justices had no power under the Act to order their decree for expenses to be enforced by imprisonment. The High Court of Justiciary sustained this ground of suspension, but held that that incompetency did not vitiate the whole judgment and conviction; they held that the affirmance of the original sentence was one thing, and the incompetent addition another, and separable from it, and accordingly suspended that part of the judgment which authorised imprisonment in default of payment, and *quoad ultra* repelled the reasons of suspension.[1]

PROCEDURE IN SUSPENSIONS. Disposal of the case.

On the other hand, in *Ross* v. *Stirling*,[2] the Court held that the good and bad parts of the sentence were not separable. In a prosecution under 25 and 26 Vict., cap. 35 (The Public Houses (Scotland) Amendment Act, 1862), which does not authorise an award of expenses, the Justices convicted the accused, and imposed a penalty of five shillings, with a sum of one pound fifteen shillings of expenses, and, in default of immediate payment of penalty and expenses, adjudged him to be imprisoned for ten days. The Court suspended this sentence *simpliciter*,[3] holding that the faulty part of the conviction was not separable, as they could not tell how much of the imprisonment was awarded for non-payment of the penalty, and how much for non-payment of the expenses.

When relevant objections to the conviction are made by the suspender which are not admitted by

[1] INTERLOCUTOR, 4 Irv. 203.—"Pass the bill so far as relates to that "part of the judgment of the Justices in the Court of Quarter Sessions, by "which the Justices adjudge the suspender to be imprisoned for the period "of three weeks in default of the sum of £2, 9s. of expenses thereby found "due not being paid within four days, and suspend that part of the judg-"ment accordingly: *Quoad ultra* repel the other reasons of suspension: "Find no expenses due to either party."

[2] *Ross* v. *Stirling*, H. C., Oct. 22, 1869, 1 Couper, 336.

[3] INTERLOCUTOR, p. 347.—"Having considered this bill, and heard "counsel *hinc inde*, Pass the bill, suspend the sentence complained of *sim-*"*pliciter*, and ordain the sum of fine and expenses to be repaid to the sus-"pender, and decern: Find the respondent liable in expenses, which modify "to six guineas, for which, with one guinea as the dues of extract, decern."

PROCEDURE IN SUSPENSIONS.

Disposal of the case.

the respondent, and do not appear on the face of the proceedings, the Court sometimes, before deciding the case, remit to some competent person, the Sheriff or Sheriff-substitute of the county (provided they have not tried the case), or some special commissioner, to inquire into the matters averred, and to report. Thus, where the suspender averred that he had been peremptorily refused a continuation of the diet, which he had craved in order to prepare for his defence, and that the doors of the Police Court had been closed in order to exclude his friends and witnesses, he was allowed a proof of his averments, and the respondent a conjunct probation.[1] Again, where it was averred, *inter alia*, that two exculpatory witnesses who were in attendance were refused admittance by the officer of Court, the Court before answer remitted to one of the Sheriff-substitutes of Lanarkshire "to investi-" gate into these averments, and to report either " the evidence taken by him, or the result thereof, " as he shall judge to be most fitting."[2]

This course, however, will not be followed unless the averments are relevant and specific, and unless the matters complained of really amount to oppression, or to a miscarriage or denial of justice.[3] If the objection is one which should have been taken in the inferior Court, but, through the suspender's fault, was not stated and recorded, an inquiry will not be allowed.[4]

When the Court recal or vary the conviction in whole or in part, they may also remit to the inferior Judge, with instructions to dispose of the case; but this is not so frequently done in

[1] *Orr* v. *M'Callum*, H. C., June 25, 1855, 2 Irv. 183. See interlocutor, p. 188. See also *Mahon and Macmahon* v. *Morton*, H. C., Feb. 6. 1856, 2 Irv. 383.

[2] *Wright* v. *Dewar*, H. C., Nov. 27, 1873, and March 9, 1874, 2 Couper, 504. See interlocutor, p. 514. See also *Blyths* v. *M'Bain*, H. C., Feb. 20, 1852, J. Shaw, 554; and *M'Allister* v. *Cowan*, May 24 and July 16, 1869, 1 Couper, 302.

[3] *M'Lean* v. *Macfarlane*, H. C., March 9, 1863, 4 Irv. 351.

[4] *North British Railway Company* v. *Rennie*, Stirling, April 20, 1874, 2 Couper, 541.

suspensions as in advocations and appeals; as, in suspensions, the whole case has usually been exhausted, rightly or wrongly, in the inferior Court, and the supreme Court either refuse or pass the bill *simpliciter*, or themselves make such modification or alteration on the judgment as may be necessary. They do not often give the prosecutor an opportunity of proceeding *de novo* in the inferior Court; but such a course is not incompetent, and if the successful objection is considered technical, such a remit is sometimes made.[1]

PROCEDURE IN SUSPENSIONS. Disposal of the case.

In *Patterson* v. *Malcolm*[2] the Justices in Quarter Sessions having dismissed an appeal against a conviction under 17 Geo. III., cap. 56, on the ground that the appellant Patterson had not complied with certain provisions of that statute, the High Court, on a suspension being brought by Patterson, recalled the sentence dismissing the appeal, and remitted to the next General or General Quarter Sessions to proceed with the matter of the appeal. In that case, however, the procedure in the inferior Court was not exhausted, the appeal to Quarter Sessions not having been disposed of.

Sometimes the Court state the grounds of their judgment in their interlocutor. They do so especially when they quash or alter a conviction or judgment; and the more readily if numerous objections are stated, some of which only are sustained. If the suspension is refused, no reasons are usually given; they simply "refuse the bill."

If the suspender is in prison, the Court, if they quash the conviction, order his immediate liberation. They also ordain any fine, penalty, or expenses which he may have paid under the judgment complained of to be repaid to him.[3]

[1] See *Baird* v. *Rose*, Ayr, Sept. 27, 1865, 5 Irv. 200.

[2] *Patterson* v. *Malcolm*, H. C., June 8, 1867, 5 Irv. 415. See also *Mackersie* v. *M'Dougall*, H. C., Nov. 27, and Dec. 27, 1874, 3 Couper, 54.

[3] *Ross* v. *Stirling*. H. C., Oct. 22, 1869, 1 Couper, 336; interlocutor, p. 347; *Rhodes* v. *Ross*, Stirling, Sept. 23, 1870, 1 Couper, 469; interlocutor, p. 476.

PROCEDURE IN SUSPENSIONS.

Where the suspender has been liberated on caution, the Court usually make no order in their interlocutor as to delivering up the bond of caution; an order is not required.

Expenses.

Expenses.—In the absence of express statutory regulation, the Court may award, modify, or refuse expenses; and in doing so they proceed substantially on the same rules as in civil cases, the amount of success, and the mode in which the case has been conducted, being the principal elements taken into consideration.

Sometimes the successful party is awarded expenses both in the inferior Court and in the High Court. In *Wilson* v. *Morrison*,[1] the respondent was found liable in expenses in both Courts, although the case was decided upon an objection which originated with the Bench, and was not pleaded by the suspender.

In *Christie* v. *Adamson*,[2] a conviction obtained under 13 Geo. III., cap. 54 (one of the Game Laws), was set aside on the grounds that the Justices had failed,—1st, To give a written deliverance disposing of an objection to the relevancy of the complaint; and 2dly, To take down the evidence in writing.

The respondent, who was Procurator-Fiscal in the Justice of Peace Court, was found liable in expenses in both Courts, although it was urged on his behalf that the statute did not authorise an award of expenses against him.

In a trial by Sheriff and jury, the jury returned a verdict of guilty, as libelled, "of writing letters "of a threatening tendency."

The prosecutor (the Procurator-Fiscal) expressed to the Sheriff doubts whether sentence could follow on the verdict, the jury not having found the accused guilty of *sending* the letters, and proposed that the jury should be reinclosed in order that a

[1] *Wilson* v. *Morrison*, H. C., June 15, 1844, 2 Broun, 231.
[2] 1 Irv. 293.

PROCEDURE IN SUSPENSIONS. Expenses.

proper verdict should be returned. The Sheriff, however, overruled this suggestion, and the Procurator-Fiscal moved for sentence, which was pronounced. The Court suspended the sentence *simpliciter*, the Fiscal not defending it; but, in respect that it was not disputed that the Fiscal moved for sentence in deference to the Sheriff's opinion, found him liable only in expenses incurred in the High Court.[1] The Lord Justice-Clerk (Inglis) said,[2] "As "the Court were not disposed to lay it down that "it would have been proper for the respondent to "have acted otherwise in opposition to the opinion "of the local Judge, so they did not think it would "be just to subject the Procurator-Fiscal in the "expenses of the inferior Court. With regard, "however, to the expenses in this Court, they must "fall on the Procurator-Fiscal, as the suspension "must be sustained."

In general, however, it is no answer to a demand for expenses that the fault or irregularity which leads to suspension lay with the Judge or the jury, and not with the prosecutor.

While it is thus competent to award the expenses incurred in both Courts, the Court of late years have been in the practice in most cases of modifying a sum in name of expenses, without saying whether they are the expenses in both Courts or not. While this mode of awarding expenses has much to commend it, it has this disadvantage, that, the account of expenses not being before the Court, the sums awarded are sometimes inadequate to reimburse the successful party for the necessary outlay.

From two of the cases just quoted[3] it will be observed that in the matter of expenses the Procurator-Fiscal does not (apart from the provisions of section 22 of the Summary Procedure Act, to be presently noted) stand in a more favourable position

[1] *Gray* v. *Mackenzie*, H. C., Feb. 24, 1862, 4 Irv. 166.
[2] 4 Irv. 169.
[3] *Christie* v. *Adamson*, and *Gray* v. *Mackenzie*, *supra*.

PROCEDURE IN SUSPENSIONS.

Expenses.

than a private prosecutor, whether the prosecution is at common law or under statute, provided the statute does not expressly or by implication forbid an award of expenses against him.

It is true that in prosecutions at common law it is not usual in the event of conviction to ask or give expenses against the accused in the inferior Court, and that on the other hand it is not usual in the event of acquittal to award him expenses. But this practice does not protect the Fiscal in the event of the conviction being quashed.[1] The inclination of the Court is not to award against him the expenses incurred in the inferior Court, unless his proceedings have been slovenly, irregular, or oppressive; but the expenses of the suspension are given almost invariably, even where the Fiscal does not defend the conviction.[2]

The 22d section of the Summary Procedure Act[3] affords a protection in some cases to prosecutors in the matter of expenses. The fair meaning of that section seems to be this: In prosecutions for statutory penalties, brought by complaint under the Summary Procedure Act, expenses shall not be awarded to or against any public prosecutor, or party prosecuting under the authority of the special statute, unless such an award of expenses is expressly authorised by the special statute, or unless, on a fair reading of the statute, it appears to be intended that expenses should be awarded. In order to entitle the prosecutor to the benefit of this clause, it is necessary—1st, that the complaint be brought under the Summary Procedure Act; 2dly, that it be a complaint for a statutory penalty; 3dly, that the statute founded on does not authorise (*i.e.* direct, expressly or by implication), an award of expenses.[4] The protection does not apply to complaints at

[1] See notes to section 22 of the Summary Procedure Act, p. 104, *supra*.
[2] *Gray* v. *Mackenzie*, *supra*.
[3] See the section quoted, *supra*, 104.
[4] Per Lord Justice-General Inglis in *Ross* v. *Stirling*, 1 Couper, 343, quoted p. 105, *supra*.

common law, or to any complaints which are not brought under the Act of 1864; the only cases to which it seems to apply are statutory prosecutions brought under that Act, where the special statute is altogether silent as to expenses. Lastly, it applies only to expenses in the Court below, and not to expenses in the superior Court.[1]

PROCEDURE IN SUSPENSIONS.

Expenses.

Most penal statutes contain some directions on the subject of expenses, and those directions, if explicit, must be followed by either awarding or refusing expenses. Where a statute authorised an award of expenses in the inferior Court to the prosecutor on conviction, but was silent as to giving the respondent his expenses if acquitted, the Court held that by necessary implication the latter was entitled to expenses in that event.[2]

When the statute is altogether silent on the subject, opinions have been expressed by some Judges, though with hesitation, that it is competent,—unless the case comes under the provisions of the Summary Procedure Act,—to award expenses in virtue of the inherent power which every Court possesses to do so, except in so far as that power is curtailed by statute.[3]

In a trial case attended with difficulty, where suspension was refused, expenses were awarded to neither party.[4]

Where the suspender had caused unnecessary expense by stating and insisting in untenable pleas, he was, although successful, allowed only the expense of printing the bill of suspension and an additional plea in law.[5]

It is not usually considered a reason for refusing expenses, or even for making a modification,—*i.e.* a deduction from the expenses awarded,—that the

[1] *Nimmo* v. *Clark and Wilson*, 10 Macph. 482, *supra*, p. 104.
[2] *Walker* v. *Bathgate*, H. C., June 4, 1873, 2 Couper, 460.
[3] See opinions of Lords Kinloch and Cowan in *Ledgerwood* v. *M'Kenna*, Dec. 18, 1868, 7 Macph. 261.
[4] *Gray* v. *Mackenzie*, *supra*.
[5] *Halliday* v. *Bathgate*, H. C., June 1, 1867, 5 Irv. 382.

PROCEDURE IN SUSPENSIONS Expenses.

objection sustained was not taken in the inferior Court; but this is a matter entirely in the discretion of the Court, and depends in a great measure on the nature of the objection and the whole circumstances of the case.

As already mentioned, the Court usually themselves modify or fix a lump sum for expenses, and also give decree for £1, 1s. for the dues of extract.[1] Where the procedure has been more prolonged than usual, or where expenses in both Courts are given, decree is given for the expenses as they shall be taxed by the Clerk of Court.

Suspension of illegal or irregular Warrants.—Suspension is the proper mode of bringing under review an illegal or irregular warrant granted by an inferior Judge;[2] but a distinction must be made. Some warrants pronounced in the course of proceedings before the inferior Court,—such as the warrant for the apprehension of the accused, or the warrant committing him to prison "until liber-"ated in course of law,"[3] or during an adjournment of the Court,—cannot in ordinary circumstances be reviewed until final judgment, or until the cause is abandoned; and this for the same reasons of expediency which render advocation of an interlocutor of relevancy, or of an interlocutor sustaining the competency of an appeal to Quarter Sessions, incompetent *pendente processu.*[4] But it is competent in certain cases to bring a suspension of

[1] The extract is prepared by the Clerk of Justiciary. See example in Appendix.

[2] On the requisites of search warrants see p. 132, *supra*.

[3] In *Bannatyne* v. *M'Lullich and Fraser*, H. C., June 18, 1860, 3 Irv. 605, the Court, in rather peculiar circumstances, suspended a warrant committing the suspenders to prison until liberated in due course of law, but found no expenses due. The complaint under which that warrant was pronounced was not proceeded with. The accused were convicted of the same offence under a new complaint, and the sentence then pronounced was set aside by the Court of Justiciary. The suspenders then brought a suspension of the former complaint and warrant. The Court thought that suspension was unnecessary, but suspended the warrant complained of, the Lord Justice-General saying, "I see no harm in suspending it. The two sets of "proceedings, apparently independent, might create a difficulty."

[4] *Supra*, pp. 165, 166.

SUSPENSION OF ILLEGAL WARRANTS.

an incidental warrant without awaiting the termination of the main process, because such warrants, though connected with the main process, are to certain effects independent of it. For instance, illegal or irregular search warrants may be at once reviewed by suspension. Such warrants are purely incidental; they may be granted, although no one is under charge, in the course of a precognition; again, where some one is under charge, the houses of others than the accused may be searched. Even in a question with the accused, there seems to be no reason why such a warrant should not be at once suspended, without awaiting the conclusion of the cause. The ordinary procedure under the complaint may be legal and regular, while the search warrant is illegal and oppressive; and it does not follow, because the search warrant is suspended, that the prosecution should be quashed or interfered with. In *Bell* v. *Black and Morrison*,[1] and *Webster* v. *Bethune*,[2] the suspenders were not under charge when the search warrants complained of were granted; but there is no good reason why, because a man is under charge, he should not be entitled to object to his repositories being searched in an illegal manner—perhaps for articles not connected with the charge against him.

Suspension at the instance of persons not under charge.—As persons other than parties accused or under charge may be affected by illegal warrants or judgments, suspension is competent at their instance. The two cases just mentioned were at the instance of persons not under charge. Again, a warrant committing a witness to prison for prevarication may be reviewed by suspension;[3] but such a committal being the independent act of the Judge, there may be a question whether he, and not the prosecutor, is not the proper respondent in the suspension.[4]

[1] 5 Irv. 57; *supra*, p. 133. [2] 2 Irv. 596; *supra*, p. 133.
[3] *Nicholson* v. *Linton*, H. C., Nov. 18, 1861, 4 Irv. 115.
[4] *Ibid.*

SUSPENSION OF ILLEGAL WARRANTS.

In *Middlemiss* v. *d'Eresby*,[1] a complaint charging an offence under 2 and 3 Will. IV., cap. 68, sec. 1, was served on *Alexander* M., in which he was designed *James* M.; *Alexander* having, when detected stealing hares, given the name *James*, which was the name of a younger brother. Sentence having been pronounced against *Alexander* under the name of *James* M., the Court, in a suspension at the instance of *James* and his father, suspended *simpliciter*, and awarded expenses against the respondents.

Present Procedure in enrolling a Case for Hearing.—It has already been explained that in the first interlocutor ordering intimation, &c., the day for the hearing is left blank. Until recently the practice as to putting the case out for hearing was that the Justiciary-Clerk waited till a few criminal suspensions or advocations accumulated, and then applied to the Lord Justice-General or Lord Justice-Clerk to fix a day for hearing them. On a day being fixed, the Clerk put the cases to the Roll and intimated the diet by letter to the agents for the parties. Thus the case was put out for hearing without either party moving in the matter. The present practice is not to put the case to the Roll for hearing except on the application of both or either of the parties by signed memorandum (bearing a £2, 2s. or £1, 1s. stamp) requesting that the case shall be enrolled for hearing.[2] The memoran-

[1] H. C., March 16, 1852, J. S. 557.

[2] MEMORANDUM

IN

THE BILL OF SUSPENSION,

in which A B is Suspender,

AND

C D is Respondent.

That the said A B is desirous that the Court should direct the said case to be enrolled for hearing for such day as may be convenient.

(Signed) A B, Suspender.
Or E F, Agent for A B.

Note.—The fee is £2, 2s. if the memorandum is joint, and £1, 1s. if it is presented by one of the parties only.

dum, according to the present practice, must be signed by the party, or by his agent or counsel. On this memorandum being laid before the Judge, or upon the Clerk informing him that it has been lodged, a day is fixed for the hearing, and the case is enrolled and the diet intimated as before. If neither party moves, the case is not put out.

PUTTING OUT A CASE FOR HEARING.

This memorandum is now used in all processes of review before the High Court, including appeals under the Act of 1875.

If no appearance is made for the suspender at the hearing, the bill is refused, with expenses; and if the appellant has obtained interim liberation, warrant is issued for his apprehension and re-imprisonment, as already explained, *supra*, p. 177.

If no appearance is made for the respondent the suspender must satisfy the Court that the decision complained of is erroneous.[1] If he fails to do so suspension will be refused.

SECTION III.

APPEAL ON A CASE STATED UNDER THE SUMMARY PROSECUTIONS APPEALS (SCOTLAND) ACT, 38 & 39 VICT., CAP. 62.

This mode of review is by appeal upon a case stated by the inferior Judge. The statute is adapted from the English and Irish Statute, 20 & 21 Vict., cap. 43, which, it will be remembered, was passed to supplement the English Summary Procedure Act, 11 & 12 Vict., cap. 43.[2]

It has been thought best to follow the course adopted in regard to the Summary Procedure Act, and give the Act in full, with explanatory notes.

[1] See *List* v. *Pirrie*, H. C., Dec. 23, 1867, 5 Irv. 559, in which an advocation was *refused* as incompetent in the absence of the respondent.

[2] *Supra*, p. 51.

THE SUMMARY PROSECUTIONS APPEALS (SCOTLAND) ACT, 1875.

38 & 39 VICTORIA, CAP. 62.

An Act to alter and amend the Law relating to Appeals in Summary Prosecutions before Inferior Judges in Scotlaud.—[11*th August* 1875.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as "The Summary Prosecutions Appeals (Scotland) Act, 1875."

Interpretation of terms.

2. In this Act the following terms have the meanings herein assigned to them; that is to say,

"Inferior Judge" means and includes any Sheriff or Sheriff-substitute, Justice or Justices of the Peace, or Magistrate or Magistrates:

"Magistrate" means a Magistrate of any royal burgh, or of any burgh returning or contributing to return a member to Parliament, or of any burgh of regality or barony, and includes any Commissioner of Police authorised to act as a Judge under any general or local Police Act:

"Cause" means and includes every proceeding which may be brought under the Summary Procedure Act, 1864[1], and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge:[2]

"Clerk of Court" means the Clerk of the Court of an inferior Judge, and includes any Depute-

Clerk of Court or other person authorised to act, and acting for the time as such Clerk of Court:

SECTION 2. Interpretation of terms.

"The Respondent" means and includes any party to a cause other than the party appealing under this Act against the determination thereof by an inferior Judge.

[1] See section 3 of the Summary Procedure Act and notes, *supra*, p. 67, *et seq.* As to cases excepted from the provisions of that Act, see section 25, p. 106, *supra.*

[2] The effect of this part of the definition seems to be to render appeal competent, without restriction, in all summary proceedings for the prosecution of offences or recovery of penalties competent to be taken in any of the Courts here mentioned, whether under special statute or at common law, and whether of a civil or a criminal nature; and this notwithstanding that review may be excluded or restricted, or some special mode of review provided by the special statute.—See section 3, *infra.*

But if this mode of review is adopted, the appellant is held to have abandoned all right otherwise competent to him of appealing to any superior or other Court.—See section 9, *infra.*

Inferior Judge, on application of party aggrieved, to state a case for opinion of superior Court.

3. On an inferior Judge hearing and determining any cause,[1] either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law,[2] appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction or complaint under such Act,[3] by himself or his agent applying in writing[4] within three days after such determination[5] to the inferior Judge to state and sign a case, setting forth the facts and the grounds of such determination,[6] for the opinion thereon of a superior Court of law as hereinafter provided; and on any such application being made, the following provisions shall have effect:

1. The Appellant shall not be entitled to have a case stated and delivered to him unless within the said three days[7] he shall—

(1.) Lodge in the hands of the Clerk of

SECTION 3. Provisions as to applying for a case.

Court a bond, with sufficient cautioner, for answering and abiding by the judgment of the superior Court in the appeal, and paying the costs should any be awarded by that Court, or otherwise, in the discretion of the inferior Judge, shall consign in the hands of the Clerk of Court such sum as may be fixed by the inferior Judge to meet the penalty awarded, if any, and the said costs of the superior Court:[8]

(2.) Pay the Clerk of Court his fees for preparing the case:

These fees shall, till the same be otherwise fixed by Act of Sederunt, which the Court of Session is hereby empowered to pass, and from time to time thereafter to vary, be those set forth in Schedule D annexed to this Act:

2. The Clerk of Court shall, within five days after caution or consignation, and payment being found or made as aforesaid, prepare the case, and submit the same in draft to the parties or their agents:

3. Should the parties or their agents fail to agree as to the terms of the case, the inferior Judge shall settle the same:[9]

4. The case shall be as nearly as may be in the form set forth in Schedule A annexed to this Act, and shall bear to be stated by the inferior Judge and shall be signed by the inferior Judge:

5. The Appellant shall within three days after receiving the case[10] give notice of appeal in writing, together with a copy of the case, to the Respondent,[11] and shall within the same time transmit the case by post to, or cause it be lodged with one of the Clerks of the superior Court,[12] together with a certificate under the hand of himself or of his law-agent, of intimation, as herein required, having been made to the Respondent.[13]

SECTION 3. Procedure on case being lodged.

6. The Clerk of the superior Court shall on receiving the case forthwith lay the same before a Judge of the superior Court,[14] and such Judge may thereupon, if the Appellant is in custody, grant interim liberation, upon such conditions as are usual in cases of suspension and liberation, and may also grant a sist of execution upon or without caution, or make such other interim order as the justice of the case may require:[15]

7. The Clerk of the superior Court shall as soon as may be after receiving the case require the Clerk of Court to transmit the process to him, together with the notes of evidence, if any, taken in the cause, where the procedure therein is under an Act requiring such notes to be taken and preserved,[16] and the Clerk of Court shall transmit the process accordingly:

8. Any question of law arising upon the facts stated in the case shall thereafter be heard and determined by the superior Court[17] to which the case is transmitted at any sitting for which the case shall be enrolled by the direction of the said Court,[18] upon the case, without any note of appeal or written pleadings being required:

9. The superior Court shall have power to affirm, reverse, or amend the determination in respect of which the case has been stated, or to remit the matter to the inferior Judge with the opinion of the Court thereon; or to make such other order in relation to the matter and the costs of the appeal as they shall see fit;[19] or to cause the case to be sent back to the inferior Judge to be amended in such manner as they shall direct, and thereafter, on the case being amended and returned, to deliver judgment on the case as amended:

SECTION 3.

10. All orders made by a superior Court in determining a case under this Act shall be final and conclusive:

11. No inferior Judge who shall state and sign a case under this Act shall be liable in any costs in respect or by reason of an appeal against his determination.

[1] The cause must be heard and determined; appeal is not competent before final judgment.

What are "errors in point of law?"

[2] It is not very easy to define "errors in point of law." One thing is certain, viz. that the case is conclusive as to the facts found proved by the inferior Judge. The superior Court must hold those facts as proved; the evidence is not before them, and they cannot review it. But as to the conclusion to be drawn from the several facts as thus established greater difficulty arises. This enactment is specially intended to apply to a class of cases in which, previously, review was virtually excluded. Under the provisions of the Summary Procedure Act and many special statutes, no note need be preserved of the evidence, or of objections to the admission or rejection of evidence. In such cases, if it could be shewn on the face of the complaint or record that the Judge had erred in point of law, his judgment might be reviewed by suspension or some other existing mode of review; and it was not necessary that the inferior Judge should state a case shewing the grounds of his determination, as the whole matter was before the superior Court. But if the complaint and record disclosed no irrelevancy, incompetency, or illegality, such a judgment could not be reviewed, although the evidence might have been utterly insufficient to warrant it, because the Court could not know what that evidence was. Now, under the provisions of this Act the Court are told in each case the facts on which the judgment is based. The difficulty is to distinguish between a conclusion in law and a conclusion in fact. If the facts stated are utterly insufficient to warrant the judgment,—if they cannot in any reasonable view be held to constitute the offence charged,—then the judgment will be reversed as erroneous in point of law, in this sense that there is no legal evidence to support the conviction. But where there is some evidence of a relevant and competent character, the Court are not entitled to weigh it and decide whether the offence charged is proved. This is the province of the inferior Judge; and if the conclusion arrived at by him can be held to be legitimately deduced from the several facts stated, the judgment must stand, although the superior Court might have decided differently on the same facts had they been called upon to do so. In such a case no proper question of law is raised, the conclusion being a conclusion in fact. This is well put by Justice Crompton in *Belasco* v. *Hannant*, and *Barton*

v. *Hannant*, 31 L. J., M. C. 228:—"In both these cases the "Magistrate has convicted. He has no right to send us facts, "and ask our opinion on them, except only so far as they raise a "point of law; and the only question therefore which can be left "to us as a point of law in each case is, whether there was evi-"dence on which he might find the defendant guilty."

SECTION 3. What are "errors in point of law?"

The following cases illustrate the distinction.

By sec. 1 of 2 and 3 Will. IV., cap. 68 (the Day Trespass Act), it is enacted, "That if any person whatever shall commit any tres-"pass by entering or being in the daytime upon any land, without "leave of the proprietor, in search or pursuit of game," &c., "such "person shall, on being summarily convicted thereof before a Jus-"tice of the Peace, on proof on oath by one or more credible wit-"ness or witnesses, or confession of the offence, or upon other "legal evidence, forfeit and pay such sum of money, not exceed-"ing £2, as to the Justice shall seem meet, together with the "costs of the conviction." In *M'Adam* v. *Laurie*, H. C., Mar. 1, 1876, 3 Rettie, Justiciary Cases, 20, the appellant was charged before the Justice of Peace Court of the stewartry of Kirkcudbright, with having contravened this enactment, inasmuch as he did "unlawfully enter, and was, without leave of the said William "Kennedy Laurie, found trespassing upon the lands known as the "farm of Cullenoch, in the occupation of George Henderson and "James Henderson, or one or other of them, in the parish of Bal-"maglin, the property of the said William Kennedy Laurie, in "search or pursuit of game."

M'Adam v. *Laurie*.

The Justices convicted the appellant of trespassing on the farm of Cullenoch as libelled. Now, on its face the charge was relevant, and, in absence of the evidence on which the Justices convicted, there would have been nothing to show that the conviction was erroneous in point of law. But the facts stated by the Justices showed the conviction to be erroneous in point of law. In the case obtained by the appellant it was set forth that the appellant with his wife managed the farm, on which he was said to have trespassed, for George and James Henderson, and that he and his wife were the only persons resident on it; that the Court found it proved that George Henderson was tenant of the farm; that it was admitted that the tenant of the farm was entitled to kill rabbits thereon, there being no reservation of them in the lease; that the Justices found the appellant guilty upon the ground that the said George Henderson could not grant him permission to kill rabbits on said farm so as to protect him from prosecution under the Day Trespass Act. The question of law submitted to the Court was—"Can the appellant, in the circumstances stated, be "convicted of the trespass libelled?" Here a proper question of law was raised, the conclusion arrived at by the Justices being a conclusion in law, not a conclusion in fact. The Lord Justice-Clerk put it thus:—"The case comes to this, that the appellant, "being the husband of the occupant of the farm, killed these "rabbits with permission of the tenant, who was not himself the

P. 22.

SECTION 3. What are "errors in point of law?"

"occupant, and the question is—Is the appellant therefore liable "to be convicted under the Day Trespass Act? I am of opinion "that he is not. The appellant's wife occupied the farm and the "appellant managed it. Even without leave of the principal "tenant he was entitled to kill and keep down the rabbits if "nothing were said to the contrary. But the rabbits were not "reserved by the landlord, and the appellant had the leave of the "tenant."

Black v. *Bradshaw*

Again, in *Black* v. *Bradshaw*, H. C., Dec. 16, 1875, 3 Rettie (Just.) 18, a question arose on the construction of the same statute, which would not have been disclosed and could not have been decided had the facts not been stated. The defence was that the appellant, being a member of the tenant's family, could not be guilty of the offence charged. This defence having been sustained by the Justices, the Fiscal appealed under this Act. The facts stated in the case, as proved to the satisfaction of the Justices, were, that the respondent was the brother of Mrs Livingstone, the tenant of the farms of High and Low Glenluig; that Mrs Livingstone was a widow, without children, and resided on the farm of Low Glenluig; that the respondent resided with her there, and had done so for at least five years; that he assisted her in the management of Low Glenluig, and worked occasionally on both that farm and High Glenluig without receiving wages; that he lived in family with Mrs Livingstone and received his board from her; that he was not bound as a servant or to continue with Mrs Livingstone longer than he felt inclined.

The question of law stated for the opinion of the Court was,—"Whether the respondent, in the circumstances stated, is guilty "of the offence of trespass under the Day Trespass Act, 2 & 3 "Will. IV., cap. 68?"

The Court, on the authority of previous cases, reversed this judgment, the Lord Justice-Clerk saying, "The question is con-"cluded by authority. On the one hand the tenant has been held "not to be within the provisions of the Act. It is true indeed "that, in the case of *Smellie* (2 Broun, 194), Lord Mackenzie did "say that every one with the leave of the tenant would be in the "same position as the tenant himself, but the Court has not fol-"lowed that *dictum* out to its conclusion; for, on the other hand, "it was found, in the case of *Selkirk* (J. Shaw, 463), that a farm "servant did come within the provisions of the Act."

"Now, the respondent here was not even in the position of a "farm servant. There was not the same necessity or call for him "to be on the land. He was not there in respect of his ordinary "occupation, and cannot therefore be in a more favourable posi-"tion than a farm servant. He does not, in my opinion, differ "from a mere stranger, who may happen to be residing with the "tenant. I think, therefore, the appeal should be sustained." The following interlocutor was pronounced:—"Answer the ques-"tion in the case in the affirmative: Reverse the determination of "the Justices: Remit the matter to them, with this opinion, and

"direct them to proceed in consistency therewith: Find no ex- "penses due, and decern."[1] SECTION 3.

On the other hand, in *Grant* v. *Wright*, H. C., May 31, 1876, 3 Rettie (Just.) 28, an appeal was dismissed, "in respect the facts "stated do not raise any question of law for the opinion of the "Court." *Grant* v. *Wright.*

The respondent was charged with having been guilty of an offence within the meaning of the Act 7 and 8 Vict., cap. 95,[2] "in so far as on Friday, 31st March 1876, he did unlawfully and "*wilfully* take, fish for, or attempt to take, one or more salmon," &c., "by means of set lines, in or from the estuary of the river "Findhorn, at a place near Elvin Point and opposite the village "of Findhorn, without a legal right or permission from the pro- "prietor of the salmon fishings there."

The Sheriff having assoilzied the panel, the prosecutor appealed. The question of law stated for the Court was, "Whether the re- "spondent, professing to be fishing for flounders, and having "fished in a manner adapted for that purpose in the estuary of "the Findhorn at a place stated by some of the witnesses of the "complainer to be more likely for catching sea trout than flound- "ers, but which was in point of fact frequented by both kinds of "fish, and one or more sea trout having come upon his line, and "having been there found by him, and having been taken by him "from the line and appropriated, has thereby rendered himself "liable to the penalties of the statute founded on in the com- "plaint?"

The Court held that it was for the Sheriff to decide, on the facts proved, whether the taking was *wilful* or not; that the facts stated admitted of the view taken by the Sheriff; and that thus no question of law was raised by the appeal. The Lord Justice-Clerk (Moncreiff) said, "In order to prevent misapprehension, I "am anxious to explain that I by no means say that the species "or class of facts stated in this case may not justly lead to the "conclusion, in point of fact, that the accused wilfully fished for "salmon. It cannot be denied that the respondent was at one "time in the possession of these fish, having taken them off the "hook, or having them on the hook of the line which he had set. "That is a fact which, coupled with other facts, may prove that "the taking—the catching—was wilful. The Sheriff must decide "first on the fact, which depends on the evidence; and if he had "decided that the facts did prove the statutory offence, we could "not have interfered. The only question of law really involved

[1] 3 Rettie, Justiciary Cases, 20.

[2] 7 and 8 Vict., cap. 95, sec. 1.—"If any person not having a legal right or "permission from the proprietor of the salmon fishery, shall, from and after "the passing of this Act, wilfully take, fish for, or attempt to take, or aid "or assist in taking, fishing for, or attempting to take, in or from any "river, stream, lake, water, estuary, firth, sea, loch, creek, bay, or shore "of the sea, or in or upon any part of the sea within one mile of low-water- "mark in Scotland, any salmon, grilse, sea trout, whitting, or other fish of "the salmon kind, such person shall forfeit and pay," &c.

SECTION 3. What are "errors in point of law?"

"seems to be, whether, if the capturing or attempt to capture be "innocent, and the fish is brought to land innocently, the subse- "quent appropriation of the fish amounts necessarily, and by it- "self, to the offence provided for in the statute. I am of opinion "that the statutory offence implies and requires wilful capturing "or wilful attempt to capture, and that if this was not proved to "the satisfaction of the Sheriff, his judgment contains no error in "law which we are called on to rectify."

Taylor v. *Oram and Smart.*

In *Taylor* v. *Oram and Smart*, 31 L. J., M. C. 252, the question in the inferior Court was, whether a house kept by the respondents was a refreshment house in the sense of 23 Vict., cap. 27, sec. 6, and so requiring a licence. The Magistrate held that the evidence did not bring the house within the definition of the Act. The Court of Exchequer held that the evidence, as stated in a case under 20 & 21 Vict., cap 43, raised questions of fact on which the decision of the Magistrate was conclusive, and this although some at least of the learned Judges did not agree with the Magistrate in the conclusion at which he had arrived.

Martin, B., said (p. 256)—"There is only one conclusion of "fact that seems to me to follow, namely, that this was a room "kept open for public refreshment, resort, and entertainment. "That would be a conclusion in point of fact, and I agree that we "have to determine whether or not the Magistrate is wrong in "point of law, for the appeal is only given by reason of the "appellant being dissatisfied with the determination as being "'erroneous in point of law' . . . On the ground that the "Magistrate has determined the facts, I concur with the rest of "the Court that the appeal should be dismissed."

Channel, B., said (p. 257)—"It is necessary in order to sustain "a conviction to show the house was kept open also for public re- "freshment. Now, the Magistrate has found that it was not kept "open for public refreshment; he has also found that it was not "kept open for public entertainment. It is unnecessary in my "opinion to say whether, if I had been exercising the functions of "the Magistrate, I should agree either in the conclusion of law or "fact at which he has arrived. I think we must see whether the "Magistrate was necessarily wrong."[1]

Objections to admission and rejection of evidence.

In the cases just quoted the evidence was dealt with as having been competently taken, and the findings in fact as being exhaustive and conclusive; the error alleged was said to consist in the inferior Judge having drawn an erroneous conclusion in law from the admitted facts of the case. But the determination may also be erroneous in point of law in consequence of competent evidence having been rejected, or incompetent evidence having been admitted by the inferior Judge. Under the Summary Procedure Act the Judge is not required to note objections on this head.[2] But under

[1] See also *Cornwell* v. *Sanders*, 32 L. J., M. C. 6; *Brown* v. *Turner*, 32 L. J., M. C. 106; *Fuller* v. *Newland*, 27 J. P. 406; *Ex parte Hurst*, 27 J. P. 824.

[2] Sec. 16 and Schedule I. See *supra*, pp. 56 *et seq.*, 93 and 138.

this Act he must do so if either party require it—section 6; and in the case stated there must be set forth any objections to the "admission "or rejection of evidence taken in the proof."—Schedule A.

SECTION 3. Objections to relevancy.

Again, the inferior Judge's determination may be erroneous in point of law in respect of the irrelevancy of the complaint. This, it is thought, is not exactly the sort of case to which this mode of appeal was intended to apply. Such an error is patent on the face of the complaint, and is in no way dependent on the evidence. Still, it is an error in law, and so falls within the words of the section. In *Henderson* v. *Mackenzie*, March 18, 1876, 3 Rettie, 623, an appeal under this Act was entertained by the Second Division of the Court of Session, where the ground of appeal was that the inferior Judge had dismissed as irrelevant a complaint under the Dogs Act, 1871, 34 & 35 Vict., cap. 56. If appeal on this ground is competent the result is important, as such appeal may be taken notwithstanding clauses excluding review. Previously it was often found not to be easy to decide what amount of irrelevancy was required to entitle the superior Court to override such clauses.

The application of the Act has not yet been fully tested by decision. It will certainly be of the greatest utility in obtaining an authoritative judgment on the construction of the very numerous statutes which fall to be administered by inferior Judges, the great obstacle to which formerly was that the facts on which the inferior Judge proceeded were not before the Court. The cases which have as yet been before the superior Courts have almost all been of this class. It has not yet been decided whether this mode of appeal is applicable to cases where the objection goes to errors or irregularities in procedure and matters of that kind, which may in validate the final determination, but which do not make it, strictly speaking, "erroneous in point of law." Probably appeal would be held competent in such cases if the objection was taken and noted in the inferior Court. In Schedule A the Judge is directed to state not only objections to the admission or rejection of evidence, but also any "other ground of appeal against the determination," and these words may be wide enough to cover such objections.

It has been held in England that this mode of appeal does not apply to warrants granted for the recovery of rates, where the question of law stated is the validity of the rate. The reason is that in taxing statutes the validity of the rate, if it is objected to, falls to be settled by a mode of appeal specially provided. When the Magistrate is called upon to grant warrant for the recovery of the rate, the validity of the rate is assumed; and as he has thus no jurisdiction in that matter no question of law as to its validity can be decided by him, or stated for the opinion of the superior Court. This is well explained by Chief-Justice Cockburn in *Ex parte May*, 2 B. & S. 426. He says:—"The duty of Magistrates, when "payment is sought to be enforced, is to see that there is such a "rate as is alleged, and that the party summoned is assessed to it, "and that he has not paid his assessment; when they have ascer

Ex parte May.

SECTION 3. Cases to which Act applies.

"tained those matters, the rate being good on the face of it, their "duty is to enforce payment, and not to enter into a question of "its legality, which is for the jurisdiction of the Quarter Sessions "on appeal." And in the same case Justice Blackburn says (p. 430):—"The present case is not within the words or spirit of "Statute 20 & 21 Vict., cap. 43, sec. 2, which refers to matters "of which the Justices have summary jurisdiction . . . the "Justices have not jurisdiction to determine whether the rate is "good or not."

But this must not be held as implying that appeal is incompetent where the question decided by the inferior Judge is a question of law proper for his determination, although a special mode and Court of appeal may be given; for instance, an appeal to Quarter Sessions, or to the next Court of Justiciary, which, but for the provisions of this Act, would exclude review by the High Court of Justiciary or the Court of Session.—See next note and section 9. Such a construction would render this Act inoperative in a large class of cases to which it seems to be specially intended to apply.

Appeal competent notwithstanding exclusion of review.

[3] This applies, without exception, to all cases in which review is excluded or restricted by the special statute; it applies not only to clauses affecting the grounds of appeal, but also to clauses which indicate some particular Court of review, to the exclusion of all others. Thus a case may be appealed under this Act to the High Court of Justiciary or to the Court of Session, notwithstanding that by the special statute a right of appeal is given to Quarter Sessions or to the next Circuit Court, to the exclusion of all other Courts of review. Such special modes of appeal are not superseded; but if an appeal is taken under this Act the party appealing cannot afterwards avail himself of any other process of review; he must choose his remedy—section 9.

Form of application.

[4] The application may be contained in a letter, or in a minute, or it may be written upon the principal complaint, immediately after the determination complained of. The last mode is the best. If it is adopted, a note in the following terms will be sufficient:—

[*Place and Date.*]

"I hereby require you to state and sign a case setting forth the "facts and the grounds of the foregoing determination [*or* judg-"ment *or* conviction], for the opinion thereon of the High Court "of Justiciary [*or* the first *or* Second Division of the Court of "Session."] [*Signed*] A B, Complainer [*or* Respondent.]
or C D, Agent for A B, Complainer [*or* Respondent.]

As the time of lodging is essential, this note should be authenticated by the signature or initials of the inferior Judge or the Clerk of Court. If the application is by minute, it should be marked as lodged, with the date of lodging by the Judge or Clerk. If by letter, the letter should be registered; and on receipt, the Judge or Clerk should mark on the envelope the date on which it was received. If the application is by letter or minute, the judgment complained of must be quoted or distinctly referred to.

SECTION 3. Subdivision 1. Time within which case must be applied for, lodged &c.

[5] The directions in this section as to the time within which the case must be applied for, intimated and lodged, must be closely complied with, under pain of the appeal being dismissed. The following decisions under the English Act show the strictness with which similar directions have been construed in England :—

The case must be "transmitted" to the superior Court within three days after it has been delivered to the appellant—20 and 21 Vict., cap. 43, sec. 2.

In *Banks* v. *Goodwin*, 3 B. and S. 548, 32 L. J., M. C. 87, the case was delivered to the appellant's agent on 31st December 1862, who, on 1st January 1863, sent it by post to his London agent to be lodged in Court; the London agent, however, did not lodge it until the 10th of January. It was held that the case had not been "transmitted" according to the Act. The following remarks of Chief-Justice Cockburn (3 B. and S. 553) are important, as indicating what is to be held "transmitting," in the sense of the Act :—"I am quite satisfied that the interpretation sought to "be put on stat. 20 and 21 Vict., c. 43, sec. 2, by Mr M'Mahon, *i.e.*, "that the mere act of *sending off* the case, the starting it on its "way to the Court which it is meant to reach, is enough, is not "the correct one. If, indeed, a party in the country sends off "his case so that, throughout its progress to the Court, it may be "said to be in the course of transmission, I think that would be "sufficient. For we are not to put a constrained construction "on the word "transmit," but see what was the intention of the "Legislature when they used it, and what was the object they "meant to secure. Their meaning was, that the party who ob-"tains the case shall send it off within three days, so that it shall "reach the Court with the greatest despatch—that would satisfy "the exigency of the statute, Here that condition has not been "complied with. For although this case was sent off by the ap-"pellant from the country within the three days, yet, when it "reached his agent in London, that agent, instead of sending it "on without delay, so as to be on its way to the Court, kept it "for eight days lying in his office." While agreeing in the result, Justice Blackburn took a stricter view of the meaning of the word "transmit." "As at present advised, I think the condition not "complied with until the transmission is complete,—until the "case is lodged with the Court, and that must be within three "days. But it is not necessary to decide that point, and I give "no final opinion upon it. Perhaps if the case had been put in "the possession of an independent third party, *e. g.* the post-office, "and so put out of the control of the appellant, and there had been "default in the post-office, that would do, but I should be sorry "if anything I say were to encourage appellants to trust such "matters to the post. But here the case was sent by the appel-"lant's attorney to his London agent, and retained in his hands "considerably beyond the three days, and I consider the attorney "and agent as the same. The appellant has therefore not in any "sense complied with the requisites of the statute."

SECTION 3. Subdivision 1.

Under the Scotch Act, however, the appellant is authorised either to "transmit the case *by post*," or to cause it to be lodged. See *infra*, sub-division 5; and it is thought that the wider view taken by Chief-Justice Cockburn would be taken in cases arising under this Act.

Time within which case must be applied for, lodged &c.

Under the English Act, the appellant must give notice to the respondent before lodging the case. This is regarded as being a condition precedent to the right of having the case heard, and where it is not done the appeal will be struck out of the Crown paper.—*Woodhouse* v. *Woods and others*, 29 L. J., M. C. 149; *Morgan* v. *Edwards*, 29 L. J., M. C. 108. It is not enough to post the notice to the respondent within the three days if it does not reach him before the case is lodged. Thus, where the appellant, who had received the case on a Friday, sent the case to the Crown office on the next day, Saturday, and on the same day sent to the respondent a letter by post, containing a notice of appeal, and a copy of the case which was received in due course of post on the Sunday, it was held that the provisions of the statute had not been complied with, because the case was lodged before notice actually reached the respondent, although both notice and lodging took place within the three days.—*Ashdown* v. *Curtis*, 31 L. J., M. C. 216.

Again, the application for a case must be made within three days. Where judgment was pronounced on a Thursday, an application on the Monday following was held to come too late, and that notwithstanding the last day fell on a Sunday.—*Peacock* v. *The Queen*, 27 L. J., C. P. 224. The appeal was dismissed.

In *Pennell* v. *The Church Wardens of Uxbridge*, 31 L. J., M. C. 92, the Magistrates, after signing the case, sent it on a Thursday, not to the appellant, but to the solicitor who appeared for him in the case. This was held to be delivery to the appellant, and the case not having been lodged in the office of the Court till the following Monday, the appeal was dismissed.

To return to cases under the Scotch Act—If judgment is pronounced on Tuesday, the application for a case must be made at latest on the following Friday. Sunday is counted as one of the three days unless it is the last. Thus, if judgment is dated Friday, application must be made at latest on the following Monday. But if the last of the three days falls on a Sunday, there is more difficulty. It has been held in England, under the Act 20 and 21 Vict., cap. 43, that when the decision of the Justices was pronounced on a Thursday, an application to them to state a case made on the following Monday was too late.—*Peacock* v. *The Queen*, 27 L. J., C. P. 224, *supra*, which has been followed in several later cases. It is thought that, looking to the practice of the Scotch Courts in similar cases, an application made on the Monday would be held sufficient. By sec. 28 of 31 and 32 Vict., cap. 100, the Court of Session (Scotland) Act, 1868, power is given to reclaim against certain interlocutors "within six days "from their date." It has been held that where the last day for

SECTION 3. Subdivision 1. Time within which a case must be applied for, lodged &c.

lodging a reclaiming note fell on a Sunday, it was timeously lodged on the Monday following.—*Russell* v. *Russell*, Nov. 12, 1874, 2 Rettie, 82. Again, under the same section, either party may "within the said period," *i.e.*, six days, move the Court to vary the terms of any issue approved of by the Lord Ordinary. In *Craig* v. *Jex-Blake*, Mar. 16, 1871, 9 Macph. 715, the Lord Ordinary approved of the issue on Tuesday, 7th March, the sixth day from which fell on a Monday; on Tuesday, 14th March, the defender lodged a notice of motion to vary the issue with the clerk of Court, and on the same day moved the Court to vary the issue in terms of the motion. It was objected by the pursuer to the competency of this motion, that it should have been made, or at least that a notice of motion should have been lodged, within six days of the date of the interlocutor approving of the issue. In repelling this objection, the Lord President (Inglis) said, "Now "when a statute assigns a particular number of days within which "a party may exercise a privilege, it means that that may compe-"tently be exercised on the last of the days, and therefore it was "competent on the sixth day to move the Court. But the sixth "day after the interlocutor of the Lord Ordinary was Monday, "and it was impossible to move the Court on that day, it not "being a sederunt day, and therefore I think the defender was "entitled to move on the Tuesday, as being within the meaning "of the statute the sixth day." It may be said, however, that in both these cases the act in question could not be done on the last day, the clerk's office not being open in the one case, and the Court not sitting in the other; and that a different rule may be applied where the act is one which *can* be done on a Sunday, for instance, posting or sending a letter. It is certainly safer to make the application on the Saturday in all cases where the last day falls on a Sunday, or to post the letter at latest on the Sunday, if it is a case in which posting on the last day is sufficient. See note 12 to this section.

[6] See notes to Schedule A.

[7] See note 5, *supra*.

Caution and consignation.

[8] The first half of this subdivision is taken from sec. 36 of 20 Geo. II., cap. 43—see *infra*, p. 231; the latter half, which bears to be alternative, is taken from sec. 31 of 1 Vict., cap. 41—see *infra*. These directions are not properly alternative, as the former applies to all cases, including sentences of imprisonment, and the latter only to judgments imposing penalties. But the leading peculiarity of the provision is this, that although the appellant must find caution, or make consignation, as a condition of having a case stated and delivered to him, it appears from subdivision 6, *infra*, that he is not entitled, in respect of such caution or consignation, to interim liberation, or a sist of execution, as is the case in appeals under 20 Geo. II., cap. 43, and 1 Vict., cap. 41. These can only be obtained from a Judge of the superior Court, *after the case has been laid before him*, which may not be for ten days after sentence, and even then it is in his option to

SECTION 3. Subdivision 1.

Caution and consignation.

refuse or grant the application. It would appear, moreover, from subdivision 6, that the appellant may have to find fresh caution if he wishes to obtain interim liberation or a sist. It is believed that this enactment was inserted intentionally to meet the not infrequent case of an appellant obtaining interim liberation and absconding; but it cannot, it is thought, have been intended that the Judge of the inferior Court should not be applied to till the case is lodged. This is a serious objection to this mode of review, in cases where the appellant is in prison, or where immediate execution is ordained. Under the English Act, the terms on which the appellant is entitled to liberation are left to the Justices. After provisions similar to those in subsections 1 and 2 of sec. 3 of this Act, it is declared that the "appellant, if then in "custody, shall be liberated upon the recognizance being farther "conditioned for his appearance before the same Justice or Jus-"tices . . . within ten days after the judgment of the supe-"rior Court shall have been given, to abide such judgment, un-"less the determination appealed against be reversed," the recognizance being entered into before the Justice or Justices.

If a bond is not lodged, or if consignation is not made within three days, a case will not be granted.—*Johnson* v. *Simpson*, 1 L. T. (N. S.) 60.

The bond of caution will be in similar terms to the form in use in appeal sunder 20 Geo. II., cap. 43.—See *infra*, p. 235, and Appendix. The date of lodging should be noted on the back by the clerk. The bond need not be lodged at the same time that the case is applied for.—*Chapman* v. *Robinson*, 28 L. J., M. C. 30.

Judge to settle case if parties fail to agree.

[9] Although prepared by the clerk and submitted to the parties, the case is a case stated by the inferior Judge; he must therefore take care that it correctly sets forth the facts and grounds of his determination. No express provision is made for a revision of the case by him if the parties agree as to its terms, and it is only in the event of their failing to agree that it is said that he shall settle the case; but it cannot be held that he is bound to sign anything which the parties may place before him. In the English Act nothing is said as to the case being submitted to the parties; it is simply said that the party dissatisfied with the determination may "apply to the Justice or Justices to state and sign a case"—20 and 21 Vict., cap. 43, sec. 2. It is an advantage, no doubt, that the parties should have an opportunity of seeing that their respective contentions are properly set forth; but this must be subject to the supervision of the Judge, who is responsible for the contents of the case. If the Judge alters the case after its terms have been agreed on, he should communicate the alterations to the parties. If both parties are satisfied, the Judge will not often find it necessary to alter the case.

No time fixed for delivery of case to appellant.

[10] Although the time, five days, is stated within which the clerk shall prepare and submit the case, no time is fixed within which the case shall be settled by the inferior Judge, and delivered, completed and signed, to the appellant. This is an omission

which may cause delay and difficulty. Delivery to the appellant's solicitor who conducted the case in the inferior Court has in England been held equivalent to delivery to the appellant.—*Pennell*, 31 L. J., M. C. 92, *supra*.

SECTION 3. Subdivision 5.

Notice of appeal to respondent.

[11] Service is not required, and no particular mode of giving notice is prescribed. Notice of appeal may be given by letter, which, if sent by post, should be registered. It may be doubted whether posting within the three days is sufficient, if the letter and case do not reach the respondent within that time. Under the English Act, notice must be given to the respondent *before* the case is lodged; it has been held that it is not sufficient to post it if it do not reach the respondent until after the case has been lodged—*Ashdown* v. *Curtis*, 31 L. J., M. C. 216, *supra*. It will be observed that the provision which follows immediately, that when transmission by post is intended to be held as equivalent to lodging, it is expressly allowed.

Personal notice is not said to be essential. For instance, leaving the notice at the respondent's residence, or sending it by post addressed to him there, will be sufficient, provided it reach him within the three days. If the respondent cannot be found, notice to his agent is sufficient.—*Woodhouse* v. *Woods*, 29 L. J., M. C. 149; *Syred* v. *Carruthers*, 27 L. J., M. C. 273; and generally if the appellant has done all in his power to give the respondent notice, it will be held that the Act has been substantially complied with, although notice may not have reached him within the time fixed. As to what has been held sufficient evidence of intimation of an appeal under sec. 70 of the Court of Session Act, 1868, see *Stewart* v. *Stewart*, Mar. 16, 1871, 9 Macph. 740.

Transmission and lodging.

[12] The case may be either transmitted by post or lodged. If the case is posted, the fair meaning of this direction seems to be, that it is sufficient to *post* it within the three days.—See Chief-Justice Cockburn, in *Banks* v. *Goodwin*, 3 B. & S. 548, 32 L. J., M. C. 87, *supra*. Otherwise, parties living at a distance from Edinburgh (and in the majority of cases the appellant does not reside in or near Edinburgh) would have a day less in which to lodge the case than if they resided there. On receipt the clerk marks the date of lodging on the case; if it is sent by post, he should also keep the envelope in which it is sent for the sake of the post-mark.

The three days within which the case must be transmitted or lodged run from the day on which the case is signed and delivered. The date of signing should therefore be given in order to fix the day.—See note 5.

Certificate of intimation.

[13] The certificate need not be probative or attested, as in appeals under the Jurisdictions Act—*infra*, p. 237. The best way of giving a certificate is to write it on the principal case. It should state the manner in which notice has been given. For example:—

[*Place and Date.*]

"I hereby certify that I this day gave notice of appeal in "writing, together with a copy of this case, to A. B., the respon-"dent, by delivering the same to him personally at

SECTION 3. Subdivision 5.

" [*or* by posting the same addressed to
" him, *or* by leaving the same addressed to him at
"].

(*Signed*) C. D., Appellant,
[*or* E. F., Agent for the Appellant.]

First interlocutor by Judge of superior Court.

[14] One of the Lords Commissioners of Justiciary, or one of the Inner House Judges of the Court of Session, according as the case is criminal or civil.

[15] On the case being laid before the Judge, the appellant for the first time has an opportunity of obtaining liberation, or a sist of execution.—See note 7. It is in the option of the Judge to grant the application or not, and if he grants it he may order the appellant to find fresh caution; but this will not often be done, as in every case the appellant must already, as a condition of obtaining a case, have found caution to abide the judgment and pay expenses, or made consignation.

Transmission of notes of evidence.

[16] Notes of evidence, although produced, can only be looked at by the Court for a limited purpose. They will, for instance, be useful in deciding objections to the admission or rejection of evidence. But as the questions on which the opinion of the Court is asked are questions of law only, review on the facts cannot be obtained under such an appeal, although it may be otherwise competent, as the statement of the inferior Judge is conclusive on the facts. It is important that this should be kept in view, especially as, by an appeal taken under this Act, the appellant is held to have abandoned all right to appeal "in any other manner of way"—sec. 9; and thus review on the facts, even if otherwise competent, is lost.

Hearing and disposal of case.

[17] The case will be heard and determined by a quorum of the High Court of Justiciary, if the case is criminal, or, if it is civil, by one of the Divisions of the Court of Session. A single Judge cannot dispose of the case.

[18] The case is put to the roll on the application of the parties, or of either of them, by signed memorandum, in the same manner as in suspensions—*supra*, p. 188. The procedure at the hearing is the same as in suspensions—*supra*, p. 177, *et seq.* If the respondent does not appear, the appellant must show that the determination of the inferior Court is wrong.—*Syred* v. *Carruthers*, 27 L. J., M. C. 273.

[19] The powers of disposal here given as to affirming, reversing, or amending "the determination," are substantially the same as those possessed by the Court in suspensions and other processes of review. But it would appear that if the case does not, in the opinion of the Court, properly raise the question in dispute, the proper course is to send it back to the inferior Judge to be amended, and to consider it of new on its being returned amended. It has been held in England that the Court cannot, even of consent of parties, give an opinion on a question not submitted to them by the inferior Judge.—*Overseers of St James* v. *Overseers of St Mary*, 29 L. J., M. C. 26; or, at the instance of the Justices, pronounce an opinion if neither party appears—*Walters* v. *Williams*, 9 C. B. (N. S.) 179.

SECTION 3. Subdivision 9. Disposal of appeal.

The following may be taken as illustrations of the form of the interlocutor disposing of the appeal. In *Black* v. *Bradshaw*, *supra*, the interlocutor runs as follows:—"Answer the question "in the case in the affirmative: Reverse the determination of the "Justices: Remit the matter to them with this opinion, and di-"rect them to proceed in consistency therewith: Find no ex-"penses due, and decern."

In *M'Adam* v. *Laurie*, *supra*, the interlocutor ran thus:—"Answer the question in the negative: Reverse the determina-"tion of the Justices, and remit to them to dismiss the com-"plaint: Find the appellant entitled to expenses in this Court: "Remit the account thereof, and decern."

The interlocutors are written on the principal case, which thus forms the record.

Inferior Judge may refuse to state a case.

4. It shall be lawful for an inferior Judge to refuse any application made to him under this Act to state and sign a case should he consider such application to be frivolous; Provided that he shall forthwith give to the applicant a certificate of such refusal,[1] should the same be asked for; Provided also that no such application shall on any ground be refused when made by or on behalf of Her Majesty's Advocate for Scotland or by a Procurator-Fiscal prosecuting for the public interest, and such prosecutors shall not be required to find caution as herein-before provided.

[1] The certificate should be dated, as the three days within which the appellant must apply to the Court for an order on the inferior Judge run from the date of the refusal to state and sign a case.

Provisions to have effect on a case being refused.

5. When an inferior Judge shall refuse to state and sign a case, the Appellant may within three days[1] of such refusal apply by a written note to the superior Court to which the case would, if stated and signed, have to be transmitted under this Act, for an order on such Judge and on the other party to show cause why a case should not be stated. Such written note shall be in the form set forth in Schedule C annexed to this Act, and shall be accompanied by the certificate of refusal of the inferior Judge to state and sign a case, and by a statement of the nature of the cause and the facts therein, and of the Appellant's

SECTION 5. Provisions when case refused.

reasons in support of his application.[2] Any Judge of the superior Court before whom such written note shall be laid by a clerk of such superior Court may, if he sees fit, order intimation thereof to be made to the inferior Judge and the other party,[3] and thereafter dispose of such note in a summary way, and order the inferior Judge to state and sign a case, which may be in the form set forth in Schedule B annexed to this Act, or do otherwise as he shall think just, and his judgment shall be final;[4] provided, that he shall not in any case award any costs against the inferior Judge.[5] The provisions of this Act applicable to the stating and delivery to an appellant of a case on his application (including the provisions as to caution or consignation, and payment of the fees of the clerk of Court,) and to the subsequent proceedings on such case, shall apply to the stating and delivery to an appellant of a case ordered to be stated and signed under this section, and to the subsequent proceedings on such case.[6]

[1] See notes 5, 11, and 12 to sec. 3.

[2] See note to Schedule C. The application should be sent to or lodged with the clerk of the superior Court. Although nothing is said as to the mode of transmitting or lodging it, the same rules will probably be observed as in the case of transmitting or lodging a case; for example, the application may either be posted or lodged. See note 12 to sec. 3.

[3] It will often be a matter for the serious consideration of the successful party in the inferior Court whether to appear at this stage or not, because, without in reality having a solid case, a party may be able to state such a *prima facie* case as to induce the Judge to grant his application, in order that the matter may be discussed, and an unsuccessful opposition will entail expenses, even if the appeal is eventually dismissed.

[4] The refusal by the inferior Judge to state a case carries with it this important consequence, that a single Judge of the superior Court may finally prevent appeal by declining to order a case to be stated. This is a power which a single Judge does not possess in common law processes of review; but the provision is salutary, tending, as it does, to check frivolous appeals; and an application for a case cannot be refused without the inferior and superior Judge concurring.

[5] Expenses may be awarded against the respondent if he appears. See note 3.

[6] The three days within which a bond of caution must be lodged or consignation made, run, it is thought, from the day on which the judgment of the superior Court ordering a case to be stated is intimated to the inferior Judge.

SECTION 5

Party may require note of objections to evidence to be taken.

6. In order to an appeal under this Act it shall be competent for any party to a cause to require the Sheriff, or Sheriff-substitute where the cause depends before him, or the Clerk of the Court where the cause depends before any other inferior Judge, to take and preserve a note of any objections to the admissibility of evidence[1] sustained or repelled by such Sheriff, Sheriff-substitute, or other inferior Judge.

Any such note made by a Clerk of Court shall be authenticated as correct by the inferior Judge.

[1] This provision partly supplies a defect in the Summary Procedure Act, 1864, mentioned *supra*, pp. 58 and 93, note 2; but nothing is here said as to recording objections to the relevancy or competency of the charge or proceedings.—Compare section 17 of the Bill of 1864, *supra*, p. 56. If this omission is intentional, it points to its being intended that this mode of appeal should be confined to cases of mixed fact and law. On the other hand, in Schedule A, it is directed that the case shall set forth not only objections to the admission or rejection of evidence, but "any other ground of "appeal." This may include objections to the relevancy or competency of the charge or proceedings; but if either party intends to found on such objections he should ask the Judge to note them at the time. Whether the Judge is bound to record them is a more doubtful matter. If a party does not require the Judge or Clerk to note his objection to the admission or rejection of evidence he will not, it is thought, be entitled to have it stated in the case, or to found on it before the superior Court.—See *Halliday* v. *Bathgate*, *supra*, p. 92; and *Purkis* v. *Huxtable*, 28 L. J., M. C. 221; and *Motteram* v. *E. C. Railway Company*, 7 C. B. (N. S.) 58.

To what superior Court cases may be sent.

7. The superior Court to which a case stated and signed by an inferior Judge as herein-before provided shall be sent for opinion shall be the High Court of Justiciary at Edinburgh when the jurisdiction in the cause is of a criminal nature, according to the provisions contained in the twenty-eighth section of the Summary Procedure Act, 1864,[1] and either division of the Court of Session when the

SECTION 7. jurisdiction in the cause is of a civil nature according to the said provisions.

[1] *Supra*, p. 108.

Superior Courts may make rules.

8. The superior Courts may from time to time, and as often as they see occasion, make rules and orders to regulate the practice and proceedings and the fees of Court to be paid in reference to cases sent to them for opinion respectively, and stated and signed under the provisions of this Act. Until altered by such rules and orders the fees of Court shall be the same as those now exigible in processes of review at present competent.

Appeal on the case to exclude all other modes of appeal competent.

9. Any person who shall appeal[1] under the provisions of this Act from any determination of an inferior Judge from which he is by law entitled to appeal in any other manner of way[2] to any superior or other Court,[3] shall be taken to have abandoned such title to appeal in any such other manner of way as aforesaid.

[1] It is a question of some difficulty to say at what particular stage a party can be said to have appealed to the effect of precluding him from resorting to any other process of review. In *Kay* v. *The Local Authority of Kelso*, H. C., June 30, 1876, the suspender, Kay, having been convicted of a contravention of the Public Health Act, 1867, applied to the Sheriff to state a case under this Act. He found caution and the case was prepared, but before it was finally adjusted and signed Kay lodged a minute withdrawing his application for a case. He afterwards brought a suspension of the same conviction. The respondents founding on this section objected to the competency of the suspension in respect that, by appealing, Kay had abandoned right to bring a suspension. They argued that there must be some *punctum temporis* at which an appeal must be held to be taken; that an appeal can only be taken if the party applies and caution is found or consignation made within three days; that if these things are not done there can be no appeal; but that, on the other hand, if these steps are taken the party must be held to have appealed at least on the expiry of the three days. Here Kay did not withdraw his application till much later. The Court, while declining to fix positively the time at which withdrawal becomes impossible, repelled the objections. They held that there is nothing in the Act to prevent a party reconsidering his

position and withdrawing from the prosecution of his appeal after he has required the Judge to state a case, although the Court might prevent him from abandoning his appeal at a time when his doing so would be injurious to his antagonist. An opinion was indicated that, had the case been transmitted to or lodged with the Clerk of the superior Court, it would have been too late to withdraw.

SECTION 9. Appeal precludes other modes of review

This construction is much less strict than that applied to the provisions of the Jurisdiction Act as to taking and entering an appeal.—See *Anderson Brothers* v. *Jamieson, infra*, p. 233. But it may be said that three days are a short time within which to decide finally to abandon all other competent means of review, especially as this mode of review is not an unmixed blessing (see next note); and besides, the party cannot obtain liberation, or a sist of execution, until the case is lodged with the superior Court, and thus his opponent is not prejudiced.

[2] This includes common law remedies, advocation, suspension and appeal, and also any special mode of review provided by statute. It must be kept in view that appeal under this Act is allowed on questions of law only; if, then, the party is entitled to review on the facts under another process of review, he must remember that by appealing under this Act he abandons that right. The Court can only decide and answer questions of law.

"in any other manner of way."

It should also be remembered that he cannot obtain interim liberation or a sist until the case is lodged with the superior Court, which may cause a considerable delay.

[3] For instance, to Quarter Sessions or to the next Circuit Court. Appeal is competent under this Act direct to the High Court or Court of Session, notwithstanding that another Court of review is indicated in the special statute. No question can therefore arise as to the appeal having been brought to the wrong Court, unless, of course, a civil case is brought to the High Court, or a criminal case to the Court of Session.

Superior Court may order person liberated to serve unexpired period of imprisonment.

10. Where a person sentenced to a term of imprisonment by an inferior Judge shall bring an appeal, suspension, or other process of review[1] of the sentence under which he is imprisoned, and thereupon have interim liberation granted to him, such person shall appear personally in the Court before which such appeal, suspension, or other process as aforesaid shall be brought on the day or days fixed for the hearing and disposal of the same, failing which he shall be held to have abandoned the same; and the said Court shall thereon, and shall also in all other cases, in disposing of any appeal, suspension, or other process as aforesaid,[2]

SECTION 10 Appellant must be personally present at hearing and disposal, if liberated *ad interim.*

have power to grant warrant to apprehend and imprison such person for any term, to run from the date of his apprehension, not longer than the period which at the date of his liberation remained unexpired of the term of imprisonment specified in the sentence brought under review.[3]

[1] This important provision which sometimes escapes notice applies to all processes of review. The necessity for it is explained, *supra*, p. 177. The party must appear personally; it is not enough that he should be represented by counsel. He must appear not only at the diet of hearing, but also at the disposal of the case if that is postponed till another day.

[2] The Court are empowered to grant such a warrant, both in the case of the appellant not appearing personally, and also where, although he is personally present, the appeal is disposed of and dismissed.

[3] See *Lawson* v. *Mackenzie*, H. C., Dec. 3, 1855, 2 Irv. 272, quoted *supra*. p. 178, as to previous practice.

Extension of time for lodging appeals under 20 Geo. II., c. 43.

11. Where it is competent to appeal against a sentence of imprisonment to the Court of Justiciary, or any Circuit Court thereof, under the Act passed in the twentieth year of the reign of His Majesty King George the Second, chapter forty-three, or under any Act amending that Act or applying or incorporating the provisions or any of the provisions of that Act with regard to appeals, such appeal shall, if otherwise well taken, be held to be timeously made if lodged with the clerk of the Court in which the sentence appealed against was pronounced and intimated to the respondent at any time during the appellant's imprisonment under the sentence appealed against, or within ten days from the date of the appellant's liberation from imprisonment under said sentence; provided that this section shall not apply to any appeal against a sentence of imprisonment unless the imprisonment under such sentence commenced within ten days after the same was pronounced.[1]

[1] As this enactment applies exclusively to appeals under the Heritable Jurisdictions Act, and Acts which amend or incorporate its provisions as to appeals, comment is reserved. See *infra*, p. 239.

SCHEDULES.

SCHEDULE A.

In the Court of held at .

On appeal to the [High Court of Justiciary, *or* the First [*or* Second] Division of the Court of Session].

Between *A B*, Appellant.

C D, Respondent.

This is a cause [*here state concisely and without argument the nature of the cause and the facts as admitted or proved in evidence,*[1] *any objections to the admission or rejection of evidence taken in the proof,*[2] *and any other ground of appeal*[3] *against the determination of the inferior Judge.*]

The question of law for the opinion of the Court of is :—

[*Here state the question, or questions seriatim, for the opinion of the Court.*]

This case is stated by me [*or* us].

(Signature of the Inferior Judge.)[4]

[1] The terms and extent of the statement of the facts and grounds of the inferior Judge's determination must depend upon the nature of the ground of appeal in respect of which a case is demanded. If, for instance, the only objection stated turns upon some isolated fact, in respect of which the appellant maintains that his case is taken out of the statute, the case need not set forth the subordinate facts with the same minuteness which would be required if the objection involved the consideration of a number of facts. And so if the objection goes only to the admission or rejection of one witness or of one piece of evidence, the facts necessary to show the bearing of the objection should be set forth with greater prominence than the rest.

Where there is an objection to the relevancy or competency of the charge, assuming appeal on such grounds to be competent, it would appear to be unnecessary to say more than that the charge was found proved, as such an objection does not depend on the evidence; but it would not be safe to omit a short statement of the facts.

The statement should not contain a detailed analysis of the evidence, or set forth the considerations which influenced the Judge in holding such and such a fact proved,—*e.g.*, the credibility of witnesses, the weight of evidence, and the like; but it should contain a concise note of the essential facts held proved, without further comment. Again, in stating the grounds of the determination all argument should be avoided.

SCHEDULE A. Statement of facts and grounds of appeal.

Difficulty may sometimes arise as to what facts are "admitted." In the course of a summary trial admissions are occasionally made or taken for granted of which no note is kept. In such a case it is thought that the Court will not be inclined to allow the statement in the case as settled by the inferior Judge to be impugned, except upon the strongest grounds.

[2] Objections to the admission or rejection of evidence not taken and noted during the proof cannot competently be made grounds of appeal.—See section 6, note 1, *supra*, p. 209.

[3] As already explained, no provision is made by this Act for noting any objections other than those relating to the admission and rejection of evidence. The "other grounds of appeal" must therefore be those which the statute does not require to be noted. Some objections to a conviction cannot be stated till the determination is pronounced, because the complaint and evidence may be unimpeachable and the conclusion in law alone in fault. Again, objections to the relevancy or competency of the charge or proceedings should be taken at the time, and the Judge should be asked to note them, although there is no statutory obligation on him to do so. Appeals on questions of relevancy have been entertained by the Court—*Henderson* v. *Mackenzie, supra;* and it is therefore thought that the Act will be liberally construed as to the grounds of appeal. It is more doubtful whether an inferior Judge is bound to state in the case an objection to relevancy or competency which was *not* made during the trial or proceedings. Even if such an objection were stated at the proper time, there is in this Act no express obligation on the Judge to note it; and it would be strange that, if it were *not* so taken, the party should be entitled to have it stated in the case, while he would not be entitled to call upon the Judge to state in the case an objection to the admission or rejection of evidence not taken at the proper time, which the Judge is bound to note if required. At the same time, an objection to relevancy appears on the face of the charge and does not require a note to explain it; and the Court are slow, in criminal matters, to hold a party foreclosed from stating such an objection, although the fact of its not having been taken at the proper time may affect the question of expenses.

[4] If the determination complained of has been pronounced by more than one Justice or Magistrate it is thought that the case should be stated and signed by both or all of the Judges whose decision it is. The form bears that "This case is stated by me "(*or* us);" and the fact that it is stated "by us" can only be satisfactorily proved by the signatures of the Justices or Magistrates. Further, looking to the nature of the document, it is not one the preparation and signature of which could be devolved upon one Justice or Magistrate as preses, or even upon a quorum of their number. It contains not merely the determination of the Court, as a conviction does, but also the *facts* and *grounds*. These can only be stated and settled by the Judges who decided the case, though it may not always be an easy matter for five or six Justices to

agree as to the facts on which their judgment is based. The stating and signing of a case is not an ordinary part of the procedure of inferior Courts. It is a statutory creation, and there is no warrant in the statute for any but the Judge or Judges whose determination is impugned stating and signing a case. Compare *Ranken* v. *Alexander*, H. C., Feb. 15, 1836, 1 Swin. 44, and *Birrel* v. *Jones*, H. C., Feb. 27, 1860, 3 Irv. 556. In the former case, in which the prosecution was at common law, it was held sufficient that the sentence was signed by one Justice as preses, the letter P being added after his signature—this being said to be the invariable, or at least the usual, practice in Justice of Peace Courts. In the latter case, a conviction under 2 and 3 Will. IV., cap. 68, was set aside in respect it was only signed by one Justice as preses; the ground of judgment stated by the Court being that the preparation and signature of the conviction was not an ordinary part of procedure in Justice of Peace Courts, but a statutory act which required at least the signature of two Justices, that number being required by the statute in order to a conviction.

SCHEDULE A. By whom case signed

The Judge should not sign the case unless he is satisfied with it. It is believed that a case is now lying in the Justiciary Office signed by an inferior Judge, but accompanied by a statement to the effect that he does not approve of its terms. Naturally, neither party has moved.

SCHEDULE B.

In the Court of held at .

Case for the opinion of the [High Court of Justiciary, *or* the First [*or* Second] Division of the Court of Session].

In causa *A B v. C D.*

This is a cause [*here state concisely and without argument the nature of the cause and the facts as admitted or proved in evidence, any objections to the admission or rejection of evidence taken in the proof, and any other matters necessary to be stated for the information of the superior Court*].

The question of law submitted for the opinion of the Court of is:—

[*Here state the question or questions seriatim, for the opinion of the Court*].

This case is stated by me [*or* us].

[*Signature of the inferior Judge*].

SCHEDULE C.

In the Court of held at .

On appeal *A B* to the [High Court of Justiciary, *or* the First [or Second] Division of the Court of Session].

In causa *A B v. C D.*

In this cause the inferior Judge [*name the Judge or Judges*] has refused to state and sign a case for which the Appellant duly applied in writing by himself [*or* law agent] under the provisions of "The Summary Prosecutions Appeals (Scotland) "Act, 1875," as will appear from the certificate of refusal herewith produced.

This is a cause [*here state succinctly as may be the nature of the cause and the facts as admitted and proved in evidence*].

The Appellant prays for an order on the inferior Judge and the said *C D* to show cause why a case should not be stated in terms of the said statute, which order ought to be granted for the following reasons:—

[*Here state seriatim the reasons why the order should be granted.*]

[*To be signed by the Appellant or his law agent.*]

SCHEDULE D.

	£	s.	d.
For drawing case, not exceeding five sheets of 250 words each . . .	1	0	0
For drawing case, exceeding five sheets of 250 words each	1	10	0

SECTION IV.

APPEAL UNDER OTHER ACTS OF PARLIAMENT.

By many statutes a right of appeal is given to

APPEAL UNDER OTHER STATUTES TO THE HIGH COURT.

the High Court of Justiciary "where there are no "Circuit Courts;" that is, within the counties which are not allocated to any of the Circuits, being at present the three Lothians and Peeblesshire.[1] Sometimes this right of appeal bears to be given "in the "manner prescribed by and under the rules and "limitations, conditions and restrictions contained "in '20 Geo. II., cap. 43,' as the same may be "altered or amended by any Acts of Parliament "for the time being in force."[2] Sometimes "in the "manner and by and under the rules, limitations, "conditions, and restrictions which shall from time "time be prescribed by the said High Court of "Justiciary." Sometimes appeal is allowed under the rules, &c., contained in 20 Geo. II., cap. 43, subject to certain alterations or qualifications set forth in the special Act;[3] and in some cases appeal is allowed only on limited grounds, these being usually "corruption or malice and oppression on "the part of the Judge, or wilful or substantial "deviations in point of form from statutory enact-"ments, or incompetency, including defect of juris-"diction."[4]

As in such cases the High Court virtually comes in the place of a Circuit Court, it is sufficient to refer the reader to the next chapter, in which such appeals are fully dealt with. The observations there made as to appeals to Circuit under 20 Geo. II., cap. 43, may be held as applicable to appeals under those statutes which incorporate the appeal clauses of that Act by reference or at length; while section 31 of 1 Vict., cap. 41, affords a good illustration of those statutes which, while to a certain extent adopting the provisions as to appeal of 20 Geo. II., cap. 43, add to or qualify those provisions,

[1] *Supra*, p. 155.

[2] 38 and 39 Vict., cap. 86 (The Conspiracy and Protection of Property Act, 1875), sec. 20; 35 and 36 Vict., cap. 76 (The Mines (Coal) Regulation Act, 1872), sec. 61.

[3] 1 Vict., cap. 41 (Small Debt Act, 1837), sec. 31.

[4] 1 Vict., cap. 41, sec. 31; 25 and 26 Vict., cap. 35 (The Public Houses Acts Amendment (Scotland) Act, 1862), sec. 33.

APPEAL TO THE HIGH COURT UNDER OTHER STATUTES.

and also of those statutes which allow appeal only on certain limited grounds.

Except in so far as affected by express enactment, the appeal thus allowed will be heard and disposed of according to the usual rules in observance in the High Court.

While sections 34 and 36 of 20 Geo. II., cap. 43, and section 31 of 1 Vict., cap. 41, may be taken as fair illustrations of such appeal clauses, the terms of the particular statute should be closely examined and followed in each case, as in some statutes the provisions and phraseology of the appeal clauses are unusual and difficult of application. See for example sec. 33 of 25 and 26 Vict., cap. 35.

Under sec. 31 of 1 Vict., cap. 41, the High Court has a limited jurisdiction as a Court of review in civil cases, "where there are no Circuit "Courts." By sec. 12 of the Sheriff Court Act, 1853, the value of the causes in which appeal is competent is extended from £8, 6s. 8d. to £12. The subject of appeals under 1 Vict., cap. 41, is fully discussed in the next chapter.

The High Court of Justiciary not only possesses ample powers of review, but can also, in respect of its *nobile officium*, interfere in extraordinary circumstances to prevent injustice or oppression where there is no judgment or warrant to review. As to procedure in such cases see Chapter V., *infra*.

CHAPTER IV.

THE CIRCUIT COURT OF JUSTICIARY AS A COURT OF REVIEW.

SECTION I.

APPEAL UNDER THE HERITABLE JURISDICTIONS ACT, 20 GEO. II., CAP. 43.

THE jurisdiction of the Circuit Courts as Courts of review, as at present maintained and exercised, is entirely dependent on statute, the oldest in date and the most important being the Heritable Jurisdictions Act. It is unnecessary to speculate as to what powers of review, if any, the Circuit Court possessed previously to the passing of that Act. An opinion has sometimes been expressed that the Circuit Courts originally possessed all the powers of the High Court, except as regards the territory within which their jurisdiction fell to be exercised, and that the Jurisdictions Act simply introduced certain regulations as to the mode of taking appeals, and the cases in which they should be allowed in future. With submission, it may be doubted whether this view is correct. The language of section 34 of 20 Geo. II., cap. 43, seems to imply the creation of new or at least more extensive powers of review, and not merely a regulation or definition of powers already in existence. The avowed purpose of the enactment is "to the end that the jurisdiction of the Circuit "Courts may be rendered more useful and bene-"ficial to His Majesty's subjects." Then certain cases are excepted; in criminal matters, cases which infer the loss of life or demembration; and in matters civil, where the subject-matter of the suit exceeds in value the sum of £12 sterling.

APPEAL UNDER 20 GEO. II., c. 43.

Further, no appeal is competent before final decree, sentence, or judgment; and so on.[1] These provisions point to a jurisdiction being conferred more extensive at least than that previously enjoyed, but not so extensive as that possessed by the High Court. It must also be remembered that the quorum then competent on Circuit was not as large as a quorum of the High Court. Two, or in some cases one Judge, might transact the business of the Circuit; four were at that time required to constitute a quorum in the High Court; and this forms a good reason why the powers of the Circuit Court should be less extensive than those of the other.

Within the limits, however, prescribed by the Act, there seems to be no reason to doubt that the Circuit Court possesses the same powers of review as the High Court.

The clauses of 20 Geo. II., cap. 43, applicable to appeals, are sections 34, 36, and 37.[2]

Section 34 may be divided into three parts: The first describes the parties who may appeal, and the Courts from which, and the cases in which, appeal is competent; the second prescribes the mode of taking an appeal; and the third part prescribes the procedure in the Circuit Court.

I. The first part of section 34 is as follows:—

"And to the end that the jurisdiction of the Circuit Courts, in that part of Great Britain called Scotland, may be rendered more useful and beneficial to His Majesty's subjects in that part of the United Kingdom,—Be it further enacted, by the authority foresaid, that it shall and may be lawful to and for any party or parties conceiving himself or themselves aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriff's or Stewart's Court of any county, shire, or stewartry, or of the Courts of any Royal Borough, or Burgh of Regality, or Barony, or of any Court of any Baron or other Heretor having such jurisdiction as is not

[1] See also the power given by sec. 37 of certifying appeals to the Court of Session or the Court of Justiciary, "in case such Circuit Court shall, in "cognoscing or proceeding upon such appeal, find any difficulty to arise, "that by means thereof," &c., quoted *infra*.

[2] This Act, which was at first temporary as to appeals, was made perpetual by 31 Geo. II., cap. 42.

hereby abrogated or taken away, where such interlocutor, decree, sentence, or judgment shall be concerning matters criminal, of whatever nature or extent the same may be, except all cases which infer the loss of life or demembration, or in matters civil, where the subject matter of the suit did not exceed in value the sum of Twelve pounds sterling, to complain and seek relief against the same by appeal to the next Circuit Court of the Circuit wherein such county, shire, or stewartry, Royal Borough, or Burgh of Regality or Barony, or such Barony or Estate, shall lie, so as no such appeal be competent before a final decree, sentence, or judgment pronounced."

APPEAL UNDER 20 GEO. II., c. 43.

The points to be considered here are—

1. *The parties who may appeal.*—Either party to the cause, complainer or respondent, pursuer or defender, may appeal.[1] Thus the process of appeal takes the place not only of suspension, but also, as regards final judgments, of advocation. The accused can appeal on conviction, and the prosecutor on dismissal of his complaint.

2. *The Courts from which appeal lies.*—A right of appeal is given from—(1), the Sheriff's or Steward's Courts; (2), the Courts of Royal Burghs; (3), the Courts of Burghs of Regality and Barony; (4), the Courts of any Baron or Heritor in so far as their jurisdiction is not taken away by the Act.

One important class of Courts is omitted; no appeal is given from the Courts of Justices of the Peace.[2] But this defect is supplied in most of the subsequent statutes which confer jurisdiction upon the Justices.

3. *The cases in which appeal is allowed.* (1), *In criminal matters.*—A right of appeal is given against any interlocutor, decree, sentence, or judgment, of whatever nature or extent the same may be, pronounced in a criminal case, except in cases which infer loss of life or demembration; but such an appeal is not competent before final decree, sentence, or judgment pronounced. As no inferior

[1] *Gray* v. *Bonnar*, Jan. 23, 1816, 19 F. C., Appx. No. 1, which was an appeal under 13 Geo. III., cap. 54, sec. II of which is substantially the same as this clause.

[2] *Sir J. Maxwell* v. *Stansfield*, June 5, 1820, 20 F. C., Appx. 1.

APPEAL UNDER 20 GEO. II., c. 43. (1) In criminal cases.

Court now tries any cases inferring loss of life or demembration, there is hereby conferred a power of bringing by appeal before the Circuit Court all final judgments, &c., pronounced in all criminal cases brought before those Courts; that is to say, in all criminal prosecutions at common law, and all statutory prosecutions, except in so far as review is limited or excluded by the special statute. Moreover, there is nothing to indicate any limitation of the grounds upon which such appeals may be brought, or as to the power of the Circuit Court to deal with cases competently brought before them. In *Rhodes* v. *Ross* an appeal was taken to the Circuit Court against a conviction following on a prosecution for a contravention of 25 and 26 Vict., cap. 33 (which was brought under the Summary Procedure Act), on the ground that whereas that statute allowed fourteen days within which payment of the penalty imposed might be made, the Magistrates had ordained imprisonment in default of *immediate* payment. It was objected to the competency of the appeal that the statute allowed an appeal to Circuit only upon certain limited grounds;[1] that the objection stated was not one of those grounds; and that the proper remedy, if any existed, was suspension. Lord Deas held—*first*, That the Magistrates had exceeded their powers by ordaining immediate imprisonment.[2] He said, "It

[1] "Corruption, or malice and oppression on the part of the Judge, or "such deviations in point of form from the statutory enactments as the "Court shall think have prevented substantial justice from having been "done." Sec. 3 of 25 and 26 Vict., cap. 35.

[2] This opportunity is taken of pointing out an apparent conflict between this decision and a previous decision by the High Court in *M'Donell* v. *Davidson*, 1 Couper, 9, which apparently was not quoted in *Rhodes* v. *Ross*. In *M'Donell* v. *Davidson* it was held, in circumstances almost identical, that imprisonment *was* competent, failing immediate payment, in respect of the provisions of sec. 19 and Schedule K, No. 6, of the Summary Procedure Act, which enables the Judge, where the statute authorises execution by poinding and sale, and also by imprisonment for a term, to ordain immediate imprisonment in lieu of granting warrant for recovery by poinding and sale. This enactment, by allowing the Judge to dispense with poinding and sale, necessarily renders it competent to dispense with the interval usually allowed for execution by that diligence in cases where the statute directs that such execution shall precede imprisonment; but in

APPEAL UNDER 20 GEO. II., c. 43.
(1) In criminal cases.

"has been repeatedly decided in the High Court of "Justiciary in cases accounted criminal, and also "in the Court of Session in cases accounted civil, "that where what is done in the inferior Court is "outwith the statute, or contrary to the statute, "such clauses of limitation and exclusion of review "as occur in the present statute do not exclude "review." He held, *secondly*, that the Circuit Court was entitled under 20 Geo. II., cap. 43, to review the sentence on the same grounds as would have been competent before the High Court. Whatever may have originally been the precise powers of the Circuit Court, it is thought that this decision on the competency of the appeal is sound. The clause limiting review being laid aside as inapplicable, the case may be taken as if no such clause existed; and it seems to be clear that 20 Geo. II., cap. 43, does not in any way limit *the grounds* on which appeals may be brought to the Circuit Courts.[1] It is a little difficult to reconcile this decision with another in a case under the same statute, viz., *Crosbie* v. *M'Minn*,[2] which was certified to the High Court from Dumfries Circuit Court. The objection to the conviction seems to have been that the offence charged did not constitute an offence under the Act of Parliament. The High Court held the appeal incompetent, and found that the Circuit Court "had no jurisdiction to entertain the said appeal in "respect that the grounds of appeal stated are not "such as may competently be made the grounds of

M'Donell's case the statute, 9 Geo. IV., cap. 39, sec. 9, did not authorise execution even by poinding until the expiry of fourteen days. By that section the Judge is empowered "to grant warrant for the recovery of all "penalties and expenses decerned for, failing payment within fourteen "days after conviction, by poinding and imprisonment for a period not "exceeding six months." In *Rhodes* v. *Ross* the clause, 9 Geo. IV., cap. 58, sec. 21, ran thus, "And in case such penalty and expenses shall not "be paid within the space of fourteen days next after such conviction shall "have taken place, the offender shall suffer imprisonment," &c. The only difference between the cases is that poinding is authorised in the one case in addition to imprisonment, and not in the other; but in both cases fourteen days are allowed for payment before any kind of execution is authorised.

[1] Lord Deas's opinion is referred to by Lord Justice-Clerk (Moncreiff) in *Muckersie* v. *M'Dougall*, H. C., Nov. 27, and Dec. 11, 1874, 3 Couper, 62.

[2] H. C., Jan. 3, 1865, 5 Irv. 10.

APPEAL UNDER 20 GEO. II., c. 43. (1) In criminal cases.

"an appeal under the 33d section of the 25th and "26th Vict., cap. 35."[1]

In purely criminal cases or in *quasi* criminal statutory prosecutions in which the usual criminal procedure is adopted, it is not difficult to decide what is a final judgment or sentence; but in civil cases and in some *quasi* criminal cases questions have been raised which will be more conveniently dealt with under the next head.

Interlocutory judgments or incidental warrants can not be appealed *pendente processu,* and in such cases advocation or suspension must be adopted if otherwise competent.

(2) *In civil cases.*—An appeal may be taken against any interlocutor, decree, or judgment, where the subject-matter of the suit does not exceed in value the sum of £12 sterling; it being provided that appeal is not competent before final decree or judgment pronounced.

By 54 Geo. III., cap. 67, sec. 5, the limit in value was extended from £12 to £25. The right of appeal in civil cases under this clause has been much curtailed by recent enactments in regard to the Sheriff-Courts from which most of the civil appeals used to come. By the Small Debt Act 1837, appeals are competent in small debt cases only on certain limited grounds, and only in causes to the value of £12; and special provisions as to appeal are made by the Act.[2]

In regard to cases in the ordinary roll of the Sheriff Court, it is declared by section 22 of the Sheriff Court Act, 1853, not to be competent to remove or bring under review of the Court of Justiciary, by advocation, appeal, suspension, or in any other manner of way, any cause not exceeding

[1] In *M'Donald* v. *Gordon*, H. C., Nov. 2 and 3, 1868, 1 Couper, 105, the appeal was sustained, and a conviction under the same statute was set aside, in respect the complaint did not set forth a relevant statement of the offence.

[2] 1 Vict., cap. 41, secs. 2, 30, and 31; and 16 and 17 Vict., cap. 80, sec. 12, *supra*, p. 34.

the value of £25 sterling, or any interlocutor, judgment, or decree pronounced in such cause by the Sheriff.[1] This applies only to cases in the Sheriff's ordinary roll, and not to small debt cases, in which appeal is still competent under 1 Vict., cap. 41.[2]

APPEAL UNDER 20 GEO. II., CAP. 43.

(2) In civil cases.

By section 23, civil causes above the value of £12 may, by consent of parties, be tried as small debt causes; where this is done, the whole powers and provisions of the Small Debt Act, including those as to review, are held applicable to the case.

In *Campbell* v. *Gillies*[3] it was held that where an action had been remitted from the Sheriff's Small Debt Court to the ordinary roll, it did not fall under section 22 of the Act of 1853, to the effect of excluding the mode of review provided for by the Small Debt Act.

Section 22 of the Act of 1853 does not exclude appeal to the Circuit Court under the Jurisdictions Act on a question of jurisdiction.[4]

The result of these enactments is, that no judgment competently pronounced in a civil cause in the Sheriff Court can be brought by appeal before the Circuit Court *under the Jurisdictions Act;* that in cases tried in the Small Debt Court there is a limited right of appeal to the Circuit Court under the Small Debt Act; but that appeal is still competent under the Jurisdictions Act against any judgment pronounced in the Sheriff Court in cases under £25 in value, where the Sheriff has exceeded or refused to exercise his jurisdiction, or where the proceedings have otherwise been outwith the statute.

Criterion of Value.—The question in each case is, What is the value of the subject matter of the suit? When the value is under £25 appeal is competent;

[1] 16 and 17 Vict., cap. 80, sec. 22; made applicable to appeals as coming in room of advocations, by sec. 78 of 31 and 32 Vict., cap. 100.

[2] *Aitken* v. *Learmonth*, Stirling, April 27, 1855, 2 Irv. 156. See sec. 1 of 16 and 17 Vict., cap. 80.

[3] Inverary, Sept. 20, 1871, 2 Couper, 142.

[4] *Dick* v. *Great North of Scotland Railway Co.*, Aberdeen, Oct. 8, 1860, 3 Irv. 616.

APPEAL UNDER 20 GEO. II., CAP. 43. (2) In civil cases.

when it is not under that sum appeal is incompetent.

On this subject some assistance may be derived from decisions under section 22 of the Sheriff Court Act, 1853, as to the competency of advocation in civil cases, the question being the same, What is the value of the cause? But it must be remembered, in founding on such cases, that their application is rendered a little uncertain by this, that in them the burden is on the objector to show that the value is *under* £25, and if he fails to do so, review is competent; on the other hand, in appeals under the Jurisdictions Act the burden is on the objector to show that the value is *not under* £25. Therefore it does not follow that, in all cases in which advocation has been held competent, appeal would have been held incompetent, or *vice versa*, because the decision on the competency may have depended on the discharge of the burden of proof, which is not the same in the two cases.

In judging of the value of the suit, the Court look solely to the conclusions of the summons or petition.[1]

The *onus* of showing that appeal is incompetent lies on the objector.[2] He must show that the value of the cause is not under £25.

Interest is regarded as part of the subject-matter of the suit; expenses are not.

If the principal sum concluded for is less than £25, but with interest concluded for as at the date of the summons exceeds that sum, appeal is incompetent.

Appeal is also incompetent if, when decree is pronounced, principal and interest together exceed £25, though at the date of the summons they together amounted to less than £25.[3]

The expenses of the suit though concluded for

[1] *Stott* v. *Gray*, June 26, 1834, 12 S. 828.

[2] Per Lord Justice-Clerk in *Wilson* v. *Watson*, J. S. 493.

[3] *Mitchell* v. *Murray*, March 10, 1855, 17 D. 682. An advocation, held by a majority of the whole Court. See an instructive note by Lord Deas reporting the case.

(2) In civil cases.

are not looked at in judging of the value. Thus if the sum concluded for is under £25, appeal is competent, although the sum decerned for, *plus* expenses, exceeds £25.[1]

Appeal is not rendered competent by a restriction of the summons which brings the sum claimed under £25.—*Buie* v. *Steven*, Dec. 5, 1863, 2 Macph. 208; this was an advocation.

Where there is a conclusion *ad factum præstandum*, and an alternative conclusion for a money payment, the latter is taken as the test of value, and if the sum alternatively concluded for is under £25, appeal is competent.[2]

But if the sum alternatively concluded for is indefinite and not necessarily under £25, appeal is incompetent. Thus, where a petition prayed for delivery of four lambs, or payment of £10 as the price thereof, "or such other sum as should be ascertained to be the value thereof," it was held that as the value of the cause was indefinite and not necessarily under £25, advocation was competent.[3]

So in actions of accounting where a certain sum, "more or less," is concluded for, as being the balance due by the defender, appeal is incompetent, although the balance decerned for may be less than £25, because it might have been greater, the sum concluded for being indefinite.[4]

In actions of multiplepoinding the test of value is the amount admitted by the common debtor, and not the amount claimed by the various claimants in the process.[5]

[1] *Hopkirk* v. *Wilson*, Dec. 21, 1855, 18 D. 299. An advocation; decided by a majority of the whole Court.

[2] *Wyher* v. *Hendrie*, Glasgow, Sept. 17, 1849, J. Shaw, 265; *Cameron* v. *Smith*, Feb. 24, 1857, 19 D. 517—an advocation.

[3] *Shotts Iron Co.* v. *Kerr*, 2d Div., Dec. 6, 1871, 10 Macph. 195. On the question again arising in *Aberdeen* v. *Wilson*, July 16, 1872, 10 Macph. 971, the case was laid before the whole Court, when, by a majority of one, the principle of decision in *The Shotts Iron Co.* v. *Kerr* was affirmed.

[4] *Stott* v. *Gray*, *supra*; and *Lamb* v. *Henderson*, Oct. 4, 1844, 2 Broun, 311.

[5] *Mathison* v. *Monkland Iron and Steel Co. and Another*, Glasgow, Sept. 17, 1849, J. S. 266.

APPEAL UNDER 20 GEO. II., CAP. 43.
(2) In civil cases.

It is a question of some difficulty whether appeal is competent where there is a conclusion *ad factum præstandum* or for interdict, and no alternative conclusion for a money payment by which to gauge the value of the suit. The point was touched on but not decided in *Wilson* v. *Addison*,[1] there being an alternative conclusion which enabled the Court to decide the case on another ground. In *Glass* v. *Thou*,[2] Lord Moncreiff, on Circuit, held that where there was a claim for the *ipsa corpora* of some sheep, appeal was incompetent. But in the subsequent case of *Wilson* v. *Watson* a different decision was pronounced. That was an appeal from the judgment of the Sheriff, in an action of interdict brought by a heritable creditor to prevent a personal creditor from carrying of by poinding certain moveables which were on the ground included in the heritable bond. The poinding was only for £6, interest and expenses, but the value of the poinded articles was said to be much greater. The Sheriff having declared the interdict perpetual, the personal creditor appealed. It was broadly objected to the competency of the appeal that such cases were not among those reviewable under the Jurisdictions Act. Lord Justice-Clerk (Hope), without calling for a reply, repelled the objection. He held that the Jurisdictions Act, by its terms, imposed no restriction on the right of appeal, in respect of the nature of the action, provided only that the real value of the subject-matter in dispute did not exceed £25. Nor did the Act require that the conclusions of the summons in the case appealed should be pecuniary, or should bear on its face, or contain materials for shewing that the value of the subject was under £25. An appeal lay in every case, except where the subject-matter in dispute exceeded £25 in value; and in every case where a party objected to the competency, the *onus* of

[1] Perth, Oct. 11, 1845, 2 Broun, 519.
[2] April 24, 1848, Arkley, 468.

(2) In civil cases.

proving that the value exceeded that sum lay with the objector. He did not think that the case of *Glass* v. *Thou* was rightly decided. In a note he says,—"Appeal is excluded if the value is above a "certain sum. That cannot be shewn in the pre-"sent or similar cases."[1]

Again, in questions under section 22 of the Sheriff Court Act of 1853, the burden being on the objector to shew that the value of the cause is *under* £25, advocation (now appeal) would probably be held competent in such cases.[2]

In cases in which, although the sum sued for is under £25, the decision involves the question of liability to a greater amount, appeal is incompetent; as where one year's rent only is sued for, but the action is brought in order to fix the tenant's liability for the rent of the same premises under a lease for years.[3]

Final Decree or Judgment.—In *Wilson* v. *Cameron*,[4] it was held that a judgment in favour of one of the parties, and finding expenses due, was not "a final "judgment" to the effect of rendering appeal competent, as the expenses had not been taxed and decerned for. In that case the respondent, in objecting to the competency of the appeal, founded on section 131 of the then recently passed Act of Sederunt of 10th July 1839, which is to the following effect:—

"In civil causes appeals to the next Circuit Court, in terms of the Act 20 Geo. II., cap. 43, 31 Geo. II., cap. 42, and 54 Geo. III., cap. 67, are competent only after a final judgment has been pronounced, *and the matter of expenses has been disposed of*, and where the subject-matter of the suit does not exceed in value £25 sterling."

It was maintained that the true construction of this clause was that expenses, if allowed, must be

[1] J. S. 495.
[2] *Robertsons* v. *Wilsons*, March 3, 1857, 19 D. 594.
[3] *Drummond* v. *Hunter*, Jan. 12, 1869, 7 Macph. 347, Court of Lords Ordinary.
[4] Inverness, Sept. 20, 1844, 2 Broun, 284.

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taxed and decerned for before appeal became competent.

The appellant founded on a previous case, *Fulton* v. *M'Lellan*,[1] in which appeal was held competent, although expenses had not been decerned for.

Lord Mackenzie, in holding appeal incompetent, observed that he had a strong impression that the clause just quoted was framed expressly to meet the case in question.

This decision, however, was overruled in *The Dundee Whale Fishing Company* v. *Mavour and Paton*, Perth, 13th October 1848, J. Shaw, 15, where the state of matters was identical, the Lord Justice-Clerk (Hope), who consulted Lord Wood, observing that he wished to do nothing to discourage appeals to the Circuit Courts.[2]

The construction thus put upon the Act of Sederunt seems to be that an interlocutor finding expenses due, or finding no expenses due, as the case may be, is a disposal of the matter of expenses in the sense of the Act of Sederunt.

In the case of *Launders* v. *Mann and Company*,[3] which was decided shortly afterwards by the same Judges, Lords Justice-Clerk (Hope) and Wood, an appeal was taken within ten days of an interlocutor decerning for expenses, but more than ten days after the interlocutor disposing of the merits. It was argued with some force that there could not be two different dates from which the ten days must run; and that, as it had been decided in the case of *The Dundee Whale Fishing Company* that appeal was competent after decree on the merits, and before decree for expenses, the proper time from which to count the ten days must be the date of the interlocutor disposing of the merits. The Court, however, held that the objection could not be sustained. Lord Wood observed[4] that it was

[1] Glasgow, Sept. 29, 1826, Shaw (Just.), 172.
[2] J. Shaw, 16.
[3] Perth, April 24, 1850, J. Shaw, 348.
[4] J. Shaw, 348.

not the intention of the Court in the case of *The Dundee Whale Fishing Company* to pronounce any decision which would have the effect contended for.

In *Whitson* v. *Heritors of Coupar-Angus* judgment on the merits and finding expenses due was dated 24th September, and the decree for taxed expenses 29th October. Notice of appeal was served 8th November, within ten days of 29th October; but in the appeal no notice was taken of the last interlocutor giving decree for expenses. Lord Wood dismissed the appeal as incompetent. It was admitted that it would have been competent if the interlocutor of 29th October had been appealed against.[1] In *Henderson* v. *M'Aulay and Company* an appeal was held incompetent which was taken after the expiry of ten days from the decree disposing of the merits and expenses, but within ten days of a subsequent interlocutor allowing a consigned fund to be uplifted.[2]

II. The second subdivision is as follows :—

"And such appeal it shall be lawful for the party conceiving himself aggrieved to take and enter in open Court at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter, within ten days, by lodging the same in the hands of the Clerk of Court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior Judge himself, in case the appeal shall contain any conclusion against him by way of censure, or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held fifteen days at least after such service."

Section 36, which must be read in connection with this subdivision of section 34, is as follows :—

"Provided always, that wherever such appeal shall be brought, such complainer, at the same time he enters his appeal as aforesaid, shall lodge in the hands of the Clerk of Court from which the appeal is taken a bond, with sufficient cautioner, for answering

[1] Perth, April 27, 1853, 1 Irv. 221.
[2] Glasgow, April 26, 1849, J. S. 219.

APPEAL UNDER 20 GEO. II., CAP. 43.

and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and the Clerk of Court shall be answerable for the sufficiency of such cautioner."

Mode of taking an appeal.

1.—*Mode of taking and entering an Appeal in open Court at the time of Pronouncing Judgment.*

The words of section 34 may be read in two senses without doing violence to the words used.[1] *First,* by holding the words "by lodging the same "in the hands of the Clerk of Court, and serving "the adverse party with a duplicate thereof," &c., as referable both to the case of an appeal taken in open Court at the time of pronouncing judgment, and also to the case of an appeal taken within ten days thereafter. *Secondly,* by holding that these words apply only to the latter case; and that if an appeal is taken and entered in open Court when judgment is pronounced, it is not necessary to serve the opposite party with a duplicate. The reason usually given in support of the latter view is that the adverse party is sufficiently certiorated of an intention to appeal by an appeal being taken in his presence in open Court.[2]

Section 132 of the Act of Sederunt of 10th July 1839, in regard to civil appeals, does not clear up this ambiguity; it merely re-echoes the statute, the only addition being the word *both.*

"The appeal may be taken in open Court at the time of pronouncing the judgment, or within ten days thereafter, by both lodging the appeal in the clerk's hands, and serving the other party or his procurator in the cause with a copy thereof."

It is not of much importance to consider which view is the true one; but it is safer to proceed on the assumption that service is necessary in both cases.

To proceed to the question what the appeal taken

[1] See opinion of Lord Justice-Clerk (Moncreiff) in *Anderson and Others* v. *Jamieson,* 2 Couper, 365.

[2] Hume, ii. 516.

and entered must consist of—a verbal intimation of appeal is not sufficient.

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Mode of taking an appeal.

In *Anderson and others* v. *Jamieson*,[1] the appellants were convicted of an offence under 34 and 35 Vict., cap. 32, and sentenced to imprisonment, on 16th May 1872. Immediately after sentence was pronounced they intimated verbally in open Court that they intended to appeal to the next Circuit Court, and on the same day they lodged a bond of caution. The record bore the following minute, which was also dated 16th May 1872:—

"The foregoing judgment and sentence having been appealed to the Autumn Circuit Court of Justiciary, and caution having been found in terms of the statute, I hereby certify that such caution has been duly found to my satisfaction for each of the parties complained against and convicted by the foregoing sentence. (Signed) A. M'KENZIE.
Deputy-Sheriff Clerk of Perthshire."

On 11th September a note of appeal was lodged by the appellants with the Clerk of Court, and the Circuit Court was held on 19th September. The appeal was dismissed as incompetent, in respect that there was no judicial attestation of an appeal having been taken. Lord Cowan said,[2] "No written "appeal was lodged with the Clerk, or served on "the other party. There is in fact no evidence at "all that an appeal was taken. The certification "by the Sheriff-Clerk annexed to the complaint is "simply that the bond of caution was lodged, and "that the caution was satisfactory to the clerk. "Supposing the appellants' agent had entered an "appeal, and got a regular minute entered stating "that such appeal had been entered in open Court, "or had a written appeal been lodged, a similar "certificate by the clerk would have been written "out."

This case shows very strongly the necessity of there being some written judicial attestation of the

[1] H. C., Oct. 28, 1872, 2 Couper, 359, certified from Perth Circuit Court.
[2] 2 Couper, p. 366.

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Mode of taking an appeal.

fact of an appeal having been taken and entered. There is no imperative rule as to how this attestation should be made; that depends upon whether the appellant lodges a separate note or minute of appeal or not. It would be sufficient, it is thought, to lodge a note or minute bearing the date of the judgment, and signed by the appellant, or his procurator or agent, setting forth the judgment complained of, and adding, "I appeal in open Court "against the prefixed judgment (*or* interlocutor *or* "sentence) to the next Circuit Court of Justiciary, "to be held at (*name of Circuit Court*)." This minute should be docqueted or certified in writing by the Clerk of Court or the inferior Judge, as having been lodged in open Court in terms of the statute.

It is manifest that an appeal taken hurriedly in open Court cannot reasonably be expected to contain a detailed statement of the grounds of appeal. Accordingly, it has been decided that the paper lodged need not contain "reasons of appeal." In the case of *Orrock* v. *Landale*,[1] a minute of appeal was entered for Orrock (apparently in open Court[2]), which bore that appeal was taken "for reasons set "forth in the said process, and which will be stated "at the bar of the said Circuit Court of Justiciary." It was objected to the competency of this appeal that no "reasons of appeal were stated," and it was argued that the Court could not determine whether "the reasons of such appeal" were "not relevant "or not instructed,"[3] unless reasons were set forth.

Lord Cockburn, after consulting with Lord Moncreiff, repelled this objection.[4]

It is not certain whether this decision would be held to be confined to appeals taken and entered in open Court;[5] but there seems to be no solid

[1] Perth, May 3, 1844, 2 Broun, 189.
[2] This does not appear from the report.
[3] Sec. 34, 3d subdivision, *infra*.
[4] See a similar question under 2 and 3 Will. IV., cap. 68, sec. 14, in *Macgregor* v. *Latour*, H. C., Nov. 13, 1854, 1 Irv. 579.
[5] Per Lord Justice-Clerk (Moncreiff) in *Anderson and Others* v. *Jamieson*, 2 Couper, 365.

reason why it should not apply also to appeals lodged within ten days thereafter, in as far as giving the respondent notice is concerned.

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Again, where no separate writing is lodged by the appellant, a note of appeal[1] should be written on the principal summons or complaint, or in the minute-book of Court, and signed by the appellant or his procurator, and certified or countersigned by the Clerk of Court or the inferior Judge, as having been taken and entered in open Court in terms of the statute.

At the time he enters his appeal the appellant must lodge in the hands of the Clerk of Court a bond with sufficient cautioner—(1), for answering and abiding by the judgment of the Circuit Court; and (2), for paying the costs, if any shall be by that Court awarded.[2]

Where the bond did not find caution for expenses, an appeal was dismissed as incompetent.[3]

It has been held not to be necessary under the statute that the bond should be signed by the appellant, "a bond with a sufficient cautioner" being all that is required.[4]

It has also been held not to be a fatal objection to an appeal that there was no certificate that caution had been found, if in point of fact it had been found;[5] but as the time of lodging the bond is as essential as that of taking the appeal,[6] some judicial attestation of the fact made at the time seems to be necessary. In practice, the Clerk of Court certifies in writing on the appeal, or record, that caution has been found to his satisfaction in terms of the statute.[7]

[1] To the same effect as that on p. 234, taking care to identify the judgment appealed against as "foregoing," if it is so, or by description.

[2] Sec. 36.

[3] *Christie* v. *Johnston*, Sept. 14, 1854, 1 Irv. 560.

[4] *Wyllie* v. *Lawson*, Ayr, Sept. 16, 1863, 4 Irv. 441, per Lord Ardmillan.

[5] *Marshall* v. *Turner*, Glasgow, April 26, 1849, J. Shaw, 222.

[6] See note 4.

[7] "[*Place and Date*] The appellant has found caution acted in the books "of Court to abide by the judgment of the Circuit Court, and for the ex-"penses, if any, that shall be by that Court awarded in this appeal.

"[Signed] A B, *Depute Sheriff-Clerk.*"

APPEAL UNDER 20 GEO. II., CAP. 43. Mode of taking an appeal.

The bond must be lodged at the time the appeal is taken; if this is not done the appeal will be dismissed, even although the bond is lodged within ten days thereafter.[1] The Clerk of Court is answerable for the sufficiency of the cautioner.[2]

From the wording of section 34 of the Act, and also of section 132 of the Act of Sederunt,[3] it may be doubted whether service on the respondent is necessary when the appeal is taken in open Court; but in *Gall* v. *Potts* Lord Ivory dismissed an appeal as incompetent where service was not made within ten days, though the appeal had been duly taken in open Court.[4]

2. *Mode of taking an Appeal within ten days of Judgment Pronounced.*

First, The principal appeal must be lodged in the hands of the Clerk of Court in which the judgment complained of was pronounced, and a duplicate served on the respondent or his agent within ten days of the date of the judgment.

Form of Appeal.—It cannot be said that there is any uniform rule or practice in regard to the form or contents of the appeal. As to form, the observations made in regard to bills of suspension may be held as repeated.[5] The appeal is addressed, "Unto "the Right Honourable the Lord Justice-General, "the Lord Justice-Clerk, and the Lords Commis- "sioners of Justiciary, or such of their Lordships "as shall be present at the next Circuit Court of "Justiciary to be holden by them, or one or more "of their number, within the city (or burgh) of " , in the Spring (*or* Autumn) of 18 ." It may either be in the shape of a petition con-

[1] *M'Millan* v. *Campbell*, Jan. 21, 1832, 10 S. 220; *Skinner* v. *Robertson*, Perth, May 2, 1844, 2 Broun, 185; *Keane* v. *Lang*, Glasgow, May 3, 1866, 5 Irv. 248.

[2] Sec. 36.

[3] A. S., July 10, 1839, sec. 132.

[4] Ayr, Sept. 25, 1857, 2 Irv. 704.

[5] *Supra*, p. 174.

taining the reasons of appeal, and concluding with a prayer; or it may consist of an abbreviated petition and prayer, with a statement of facts and pleas in law annexed. The appeal should be signed by the appellant or his agent.

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As to the contents of the appeal, it may be doubted whether it is necessary to the competency of the appeal that reasons should be stated;[1] but it is usual and proper to state them. If no reasons are stated, it will always be in the power of the respondent to complain of having been taken by surprise, and the omission may be punished by the case being delayed, or expenses refused to or awarded against the appellant. Whether reasons are stated or not, there should be a distinct statement of the procedure in the inferior Court, and the judgment or interlocutors complained of should be quoted at length. The prayer should be carefully drawn, and contain everything which the appellant demands. The appeal may be signed either by the appellant or his procurator or agent.

When lodged, the appeal should be docqueted and initialed by the Clerk of Court as having been lodged.[2]

Service.—There are no special directions in the Act as to the mode or proof of service on the respondent or inferior Judge. The duplicate appeal need not be served by an officer of Court, or by any person in particular; but there must be a probative attestation of the fact of delivery before witnesses,[3] or a notarial instrument, unless the respondent or his agent accepts and acknowledges service.[4] In the latter case there should be a holograph acceptance of service written on the principal appeal if possible; if separate, it should be lodged with the Clerk of Court. A certificate of

[1] See the case of *Orrock* v. *Landale*, *supra*, p. 234.

[2] For instance, "Perth, 18th February 1876.—Lodged.
"[*Initialed*] A B."

[3] *M'Millan* v. *Campbell*, *infra*. This attestation or certificate should be written on the principal appeal; if on a separate paper, it should be lodged with the Clerk of Court.

[4] *Weatherstone* v. *Gourlay*, April 13, 1860, 3 Irv. 589.

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service by the *appellant's* agent, not attested by witnesses, is not sufficient.[1]

Service may be made either on the respondent or on his procurator or agent.[2] If the appeal contains any personal conclusions against the inferior Judge, service must be made on him in like manner and within the same time.

Secondly, Both the lodging and the service must take place within ten days after the date of the judgment, and fifteen days at least before the diet of the Circuit Court.[3]

In *Allan* v. *Stewart*[4] judgment was dated 24th July, the appeal was lodged timeously on 3d August, but service was not made till 12th August. Lord Cowan held the appeal incompetent, in respect that service was not made within ten days after the date of judgment.

As appeals may be taken up for discussion at any time during the sitting of the Circuit Court, the diet fixed for the meeting of the Court is the *punctum temporis* looked to in counting the fifteen days. A duplicate appeal was held to be well served on the 16th day before the diet, including in the computation both the day of service and the day on which the Court met. In other words, the fifteen days may include either the day of service or the day of the diet, but not both days.[5]

It may happen, through no fault of the appellant, that although the appeal is lodged and served within the ten days, there are not fifteen free days between service and the meeting of the Circuit Court. In a case in which this occurred, sentence being dated 14th September, and the Court meeting

[1] *M'Millan* v. *Campbell*, 10 S. 220.

[2] Sec. 34.

[3] Sec. 34 and sec. 132 of A. S. 10th July 1839; but see sec. 11 of 38 and 39 Vict., cap. 62, as to appeals against sentences of imprisonment.

[4] Inverary, Sept. 17, 1857, 2 Irv. 699.

[5] *M'Ritchie* v. *Thomson*, Perth, April 30, 1847, Arkley, 270. As to the computation of time in questions of deathbed and bankruptcy see 2 Bell's Com. (Maclaren's edition), 168, and Erskine, iii. 8, 96, and iv. 1, 41, pp. 980 and 1073 (Nicholson's Edition), and notes.

on the 28th of the same month, it was held competent to withdraw the appeal, "reserving to the "appellant all right competent to him to prosecute "the same before the next Circuit Court for the "hearing of appeals to be holden in Glasgow," and to proceed with the appeal at the next Circuit without serving of new.[1] Lord Cowan held[2] that the notice given for the first Circuit, although a bad one for that Circuit, was a good one for the next.

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An important alteration was made by section 11 of the Summary Prosecutions Appeals Act of 1875, in regard to the time for lodging appeals against sentences of imprisonment. The statutory rule that the appeal must be lodged at latest ten days after sentence pronounced sometimes operated harshly where the sentence was one of immediate imprisonment, which prevented the prisoner from taking the necessary steps to have his appeal lodged and served within the ten days.

To remedy this it is provided[3] that in appeals to the Court of Justiciary, or any Circuit Court thereof, under the Act 20 Geo. II., cap. 43, or under any Act amending it or incorporating any or all of its provisions, as to appeals against a sentence of imprisonment, such appeal shall, if otherwise well taken, be held to be timeously made, if lodged with the Clerk of Court and intimated to the respondent at any time during the appellant's imprisonment, or within ten days from the date of his liberation; but this enactment is declared not to apply to any appeal against a sentence of imprisonment, "unless "the imprisonment under such sentence commenced "within ten days after the same was pronounced,"[4] as in such cases the imprisonment forms no impediment to appealing. It may be a question whether

[1] *Newlands* v. *Stewart*, May 3, 1866, 5 Irv. 245.
[2] *Ibid.*, p. 247.
[3] 38 and 39 Vict., cap. 62, sec. 11.
[4] This excludes from the provisions of the clause cases where ten days or more are allowed for payment, or for execution by poinding, &c. before sentence of imprisonment is ordained to be enforced.

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this clause does not, in regard to the cases to which it applies, do away with the necessity of allowing fifteen days between service and the meeting of the Court. On the one hand, the words "such appeal "shall be held to be *timeously* made" are wide enough to cover everything relating to the *time* of lodging; and besides it may be said that imprisonment may not only run beyond the ten days but within the fifteen days. On the other hand, if these words are to be held to repeal the provision as to fifteen days, there is no security for the respondent being summoned, on sufficient, or, indeed, on any *induciæ*. The question has not yet arisen for decision, but it seems to be the safer view that fifteen days must still be allowed between service and the meeting of the Circuit Court, when the appeal is to that Court.

Caution.—The bond of caution must be lodged at the same time as the appeal.

III.—PROCEDURE BEFORE THE CIRCUIT COURT.

On the Court being fenced the Circuit Clerk of Justiciary calls upon parties having appeals to lodge them in his hands; the appeals and all necessary productions should then be lodged. The Court must have before them proper evidence that the decree or judgment complained of has been pronounced. In criminal cases the sentence is written on the principal complaint, which must therefore be produced. In small debt cases the principal summons or complaint, with the decree annexed, as directed by section 13, and in the form provided in Schedule A of the Small Debt Act,[1] or a certified copy thereof, or the book of causes kept in terms of section 17, should be produced.

In *Baxter* v. *Kennedy*,[2] an appeal under 1 Vict., cap. 41, was dismissed by Lords Deas and Neaves, on the ground that there was no evidence of the

[1] See 1 Vict., cap. 41, sec. 13, and Schedule A.
[2] Perth, Sept. 11, 1861, 4 Irv. 84.

Appeal under 20 Geo. II., cap. 43. Procedure before the Circuit Court.

decree having been pronounced. It was pleaded for the appellant that the book of causes kept in terms of section 17 was the best evidence of the decree, and that as the Sheriff-Clerk, in whose hands it was, was, *quoad* that process, clerk of the Court of appeal also, the decree was *in manibus curiæ*. The Court did not decide whether the copy decree in the book was equivalent to the decree, but held that "there was no evidence before the "Court that any such decree had been pronounced, "as the Court were asked to review."[1]

In a later case, where the book of causes was lodged in the hands of the Circuit Clerk, the Court (Lords Neaves and Jerviswoode) held that the decree contained in the book was the best evidence that could be produced, it being the only thing authenticated by the Sheriff.[2]

If no appearance is made for the appellant the respondent lodges a minute craving protestation and dismissal of the appeal, with expenses.

Appeals are usually heard at the conclusion of the criminal trials; but if two Judges are present it is not unusual, if they are not sitting simultaneously trying criminal causes, for one of them to dispose of the appeals.

Where the appellant has been sentenced to a term of imprisonment and liberated on caution, he must appear personally in Court on the day or days fixed for the hearing and disposal of his appeal under the penalty of being held to have abandoned it.[3] In such cases the appellant should be present at the meeting of the Court, and remain within reach till his case is disposed of.

The following are the provisions of the Jurisdiction Act as to procedure and disposal of the appeal:—

"And thereupon the Judge or Judges at such Circuit Court

[1] Per Lord Deas, 4 Irv. 85.
[2] *Sinclair* v. *Rosa*, Glasgow, April 25, 1863, 4 Irv. 390.
[3] 38 and 39 Vict., cap. 62, sec. 10.

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shall and may proceed to cognosce, hear, and determine any such appeal or complaint, by the like rules of law and justice as the Court of Session or Court of Justiciary respectively may now cognosce and determine in suspensions of the interlocutors, decrees, sentences or judgments of such inferior Courts; but the said Circuit Court shall proceed therein in a summary way; and in case they shall find the reasons of any such appeal not to be relevant, or not instructed, or shall determine against the party so complaining or appealing, the said Judge or Judges shall condemn the appellant or complainer in such costs as the Court shall think proper to be paid to the other party, not exceeding the real costs *bona fide* expended by such party; and the decree, sentence, or judgment of such Circuit Court, in any of the cases aforesaid, shall be final."

As to the hearing and disposal of the appeal the same rules are observed in criminal causes as those in force in suspensions or advocations, which have already been fully explained.[1] Civil causes are heard and disposed of in accordance with the rules of civil procedure, but in the most summary manner. Summary disposal of the cause is of the essence of this mode of review; it is better that a rough and ready mode of decision should be adopted than that further expense and delay should be incurred in cases which are unable to bear them. At the same time it often unfortunately happens that points of great importance as to the construction of penal statutes, or procedure in the inferior Courts, arise for decision in trifling appeals. A single Judge, or even two Judges, may well hesitate to decide such points without consultation with their brethren. Moreover, the Circuit Court is not a very favourable place for deciding intricate points of law; there is always more or less hurry during the hearing, not much time for avizandum, owing to the lateness of the sittings, and often a dearth of the necessary books of reference. Add to this that the papers are sometimes placed in the hands of counsel when they are engaged in the conduct of criminal trials with the result that there is a risk of the case being imperfectly argued.

[1] *Supra*, pp. 168 and 177.

To provide for this it is enacted by section 37,—

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Procedure before the Circuit Court.

"Provided always, and it is hereby enacted by the authority aforesaid, that in case such Circuit Court shall, in cognoscing or proceeding upon such appeal, find any difficulty to arise, that by means thereof such Circuit Court cannot proceed to the determination of the same consistently with justice and the nature of the case; in any such case, and not otherwise, it shall and may be lawful to and for such Circuit Court to certify such appeal, together with the reasons of such difficulty, and the proceedings thereupon had before such Circuit Court, to the Court of Session or Court of Justiciary respectively, which Courts are hereby respectively authorised and required to proceed in and determine the same."

This provision is often taken advantage of. The Judge or Judges pronounce an interlocutor in which, in respect of the importance of the questions raised, they certify the case, if it is a criminal one, to the High Court of Justiciary, to meet on a day named, and appoint the parties to be prepared to discuss the appeal at that sederunt, or at such other time as may then be fixed by the High Court. This interlocutor is written on the principal appeal, and signed by the Judge or Judges.[1] If the case is a civil case, it is certified in the same way to one of the Divisions of the Court of Session.

Strictly speaking, "the reasons of such difficulty" should be stated in the interlocutor. But the course usually followed is that, on the case being called before the High Court, the Judge who certified the case, or the senior Judge if there were two, states orally to the Court the nature of the case and the reasons of certification.[2]

[1] LORDS N and J.

Circuit Court of Justiciary,
Perth, 13th April 1876.

Act. C, for Appellant—*Alt.* D, for Respondent.

In respect of the general importance of the questions raised in this appeal, and that it is expedient that the same should be authoritatively settled by a judgment of the High Court, Certify this case to the High Court of Justiciary, to meet on Monday, the 24th day of May next; and appoint the parties to be prepared to discuss the same at that sederunt, or at such other times as may then be fixed by the said Court.

[*Signed*] C N .
C B .

[2] *Whatman* v. *Ogilvie*, H. C., June 3, 1854, 1 Irv. 483.

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The case is usually heard before a full bench, or as many Judges as can attend.

Procedure on certification.

If, on the case coming before the High Court, they are of opinion that from its nature it will be more fitly dealt with in the civil Court, they remit it to one of the Divisions of the Court of Session.[1]

When a civil case had by mistake been certified to the High Court instead of to the Court of Session, it was remitted to the Second Division of the Court of Session for their decision.[2]

An objection to the competency of an appeal cannot be stated for the first time before the High Court if it was not stated before the Circuit Court.[3]

Again, a respondent was held not entitled to plead before the High Court a ground of conviction which was not pleaded before the Sheriff or the Circuit Court, and which did not appear *ex facie* of the complaint and proceedings to be the ground on which the Sheriff convicted.[4]

In hearing and disposing of the case, the High Court proceed in the same manner as if the case had been brought before them for review in the first instance.[5]

If the appellant has been liberated on caution, he must be personally present at the hearing and disposal of the case.[6]

In regard to certification, a practical suggestion may be made for the consideration of appellants. If the question involved is one of novelty or difficulty, the more rapid and less expensive course is to bring the case at once before the High Court, if this be otherwise competent, by advocation or suspension. If it is really a question of difficulty and importance, it runs a great risk of being certified;

[1] *Beattie* v. *Gemmel*, Feb. 4, 1862, 24 D. 431; *Burrell and Son* v. *Foster*, H. C., Nov. 2, 1868, 1 Couper, 103.

[2] *Cambuslang, &c. Road Trustees* v. *Graham*, H. C., Nov. 24, 1845, 2 Broun, 550.

[3] *Whatman* v. *Ogilvie*, *supra*, p. 243.

[4] *Macdonald* v. *Gordon*, H. C., Nov. 2 and 3, 1868, 1 Couper, 105.

[5] *Supra*. p. 177.

[6] 38 and 39 Vict., cap. 62, sec. 10.

and certification involves not only delay, but a double appearance by counsel and agent, the expense of which will probably not be compensated by any expenses which may be awarded.

SECTION II.

APPEAL UNDER 1 VICT., CAP. 41, THE SMALL DEBT ACT, 1837.

By section 30 of the Act it is declared "that no "decree given by any Sheriff in any cause or pro-"secution decided under the authority of this Act,[1] "shall be subject to reduction, advocation, suspen-"sion, or appeal, or any other form of review, or "stay of execution, other than provided by this "Act, either on account of any omission, or ir-"regularity, or informality in the citation or pro-"ceedings, or on the merits, or on any ground or "reason whatever."

The means of review provided by the Act in section 31 are limited in more ways than one—*first*, as to the Court of review; and *secondly*, as to the grounds of appeal.

The Court of review.—Any person conceiving himself aggrieved by any decree given in any cause or prosecution raised under the authority of this Act, may bring the case by appeal before the next Circuit Court of Justiciary; or where there are no Circuit Courts (*i.e.*, in the three Lothians and Peeblesshire) before the High Court of Justiciary.

It is sufficient here to observe that it is incompetent, unless in exceptional circumstances, which will

[1] These are, "All civil causes and all prosecutions for statutory penalties, "as well as all maritime civil causes and proceedings wherein the debt, de-"mand, or penalty in question shall not exceed the value of £8, 6s. 8d." (raised to £12 by section 12 of the Sheriff Court Act, 1853), "exclusive of "expenses and fees of extract."—1 Vict., cap. 41, sec. 2. As to remitting cases from the ordinary to the Small Debt Roll, see sec. 4; and as to remitting cases of a higher value than £12 to the Small Debt Roll, see sec. 23 of the Act of 1853. As to whether suits for statutory penalties are still competent under the Small Debt Act, see *supra*, pp. 107 and 108.

APPEAL UNDER 1 VICT., CAP. 41.

be afterwards explained, to bring before the High Court of Justiciary, in the first instance, by advocation, suspension, or appeal, any case which could be appealed to the Circuit Court under this clause.

Mode of Appeal.—The appeal is to be taken in the manner and by and under the rules, limitations, conditions, and restrictions contained in the Jurisdictions Act, "except in so far as altered by this "Act." Passing over in the meantime the grounds of appeal, it is provided that no sist or stay of the process and decree, and no certificate of appeal shall be issued by the Sheriff-Clerk, except upon "*consignation* of the whole sum, if any, decerned for "by the decree and expenses, if any, and security "found for the whole expenses which may be "found due under the appeal."

In other respects the rules already explained as to taking and entering, and lodging and serving an appeal, and as to finding caution and lodging the bond under the Jurisdictions Act, apply to cases under this Act.

The grounds of appeal competent.—The object of this and similar clauses which restrict the grounds of appeal, is to render the judgment of the inferior Judge final, in so far as this is possible consistently with preventing injustice and oppression, or a gross disregard or abuse of statutory directions and rules of procedure.

The grounds of appeal, therefore, are intended to be exhaustive; but it will be seen presently that being coupled with a limitation of the right of appeal as to the Court of review, they do not afford a complete protection against all cases of oppression and injustice.

Before describing the grounds of appeal, it may be convenient to note shortly some of the grounds on which appeal is *not* competent.

Review on the merits is expressly excluded, and this renders incompetent any inquiry into the facts,

although the result in law may have been affected by the facts proved.[1]

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Review is also expressly excluded on the ground of any omission or irregularity or informality in the citation or proceedings which the Court shall think did *not* take place wilfully, or have *not* prevented substantial injustice from having been done.[2]

The grounds of appeal. (1) Oppression.

Lastly, review on the law is incompetent, unless the objection can be brought under one of the grounds of review mentioned in section 31.

The grounds of appeal are,—

(1), Corruption or malice and oppression on the part of the Sheriff.

Corruption need not necessarily be moral corruption, such as that attributable to bribery, undue influence or partiality. It is sufficient if there be legal corruption; such as hearing one party and refusing to hear the other; or hearing one party in the absence of the other. In arbitration law there are numerous instances of decrees-arbitral having been reduced on this ground where there was no reason to impute bad faith to the arbiter.[3]

The same observation applies to the words "malice and oppression." Personal malice on the part of the Sheriff is not required. "What was done "might be so grossly unjustifiable that the law "would hold it equivalent to personal malice."[4] This definition of malice is one well known in actions of damages for the illegal use of diligence, judicial slander, and other privileged cases. Procedure regular in itself, and which in most cases would be competent and justifiable, may in exceptional circumstance be unjustifiable and oppressive; and yet there may be no personal malice on the part of the Judge, but only an unthinking or reckless adherence to routine, where a little reflection would have shown that an applica-

[1] Sec. 30. [2] Sec. 30. [3] Bell on Arbitration, p. 36.
[4] Per Lord Deas in *Philip and Others* v. *The Forfar Building Investmen Company*, Sept. 16, 1868, 1 Couper, 87.

APPEAL UNDER 1 VICT., CAP. 41. The grounds of appeal. (1) Oppression.

tion of the usual rules to that particular case would operate unjustly. Again, a Judge through ignorance may try and decide a case not competently before him; or through slovenliness may neglect or violate some of the statutory forms in an essential respect. This leads to the observation that the grounds of appeal given in this section run somewhat into each other. For instance, there may be deviations from statutory forms so wilful, or so grossly unjust in their character, as to constitute oppression; or the Sheriff may entertain a case so palpably incompetent or beyond his jurisdiction as to bring his acts under that category. Accordingly, what in one case is called oppression, may in another be regarded as incompetency or defect of jurisdiction.

Nothing is here said of malice and oppression on the part of any one except the Sheriff. It is not often that malice or oppression on the part of one of the litigants can affect the conduct or decision of a case, unless the Judge lends himself to the oppressive proceedings. Such cases, however, may occur, as, for instance, when the pursuer prevents the defender's witnesses from coming forward to give evidence; and if this happens the defender can bring his case before the supreme Court by suspension, or by appeal under the Jurisdictions Act, notwithstanding the exclusion of review.

The following cases, which were prosecutions at common law, and under various police statutes, are instances in which convictions or judgments have been set aside on the ground of oppression:—

A person was precognosced and cited to attend as a witness at a criminal trial; on his attending he was forthwith put to the bar and tried for the offence in regard to which he was precognosced.[1]

A girl of thirteen years of age, against whom a warrant for examination on a charge of assault had

[1] *Ritchie* v. *Pilmer*, H. C., Dec. 20, 1848, J. S. 142; see also *Robertson* v. *Mackay*, H. C., July 21, 1846, Arkley, 114.

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The grounds of appeal.

(1) Oppression.

been granted by the Sheriff, was apprehended at eleven P.M., detained all night in the Police Office, without being taken before the Sheriff, and on the day following her apprehension was tried summarily and convicted.[1]

A married woman, a licensed broker in Edinburgh, was apprehended on a Monday morning, on a warrant granted on the Saturday immediately preceding. She was immediately tried summarily in the Police Court on a charge of reset of theft, under the Edinburgh Police Act, 11 and 12 Vict., cap. 113, and convicted. The decision in this case rested not on the ground that in all cases under the Police Act such summary proceedings were illegal, but on the serious nature of the charge, reset of theft, and the fact that although warrant was granted on the Saturday to cite witnesses for both parties, the suspender was unable to compel the attendance of her witnesses, who required twenty-four hours notice, as the warrant was not brought to her knowledge.[2]

A refusal of delay in proceedings under the same Act was held a good ground of suspension.[3]

A person was charged with a contravention of section 209 of the General Police Act, 13 and 14 Vict., cap. 33. Before his plea was entered he applied for delay to enable him to obtain advice, and to have an opportunity of examining witnesses. This application was refused by the magistrate, and no note was taken of the refusal, although the clerk was bound to note such refusal, in terms of certain rules framed under section 349 of the Act.[4] The grounds of appeal competent under section 33 of that Act are the same as those in section 31 of the Small Debt Act.

[1] *Crawford* v. *Blair*, H. C., Nov. 17, 1856, 2 Irv. 511.

[2] *Graham* v. *Linton*, H. C., Nov. 24, 1856, 2 Irv. 558. See also *Cogan or Devany* v. *Anderson*, H. C., Dec. 16, 1854, 1 Irv. 588.

[3] *O'Brien and Others* v. *Linton*, H. C., Feb. 21, 1857, 2 Irv. 603; and *Orr* v. *M'Callum*, H. C., June 25, 1855, 2 Irv. 183.

Mahon v. *Morton*, H. C., Feb. 6, 1856, 2 Irv. 383.

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The grounds of appeal.

(1) Oppression.

In *Gray* v. *M'Gill*,[1] a child of eight years of age was apprehended, placed at the bar of the Police Court, and tried summarily on a charge of theft under the Glasgow Police Act, 6 and 7 Vict., cap. 99, and convicted, without any communication being made to the child's father or friends, or any opportunity given of obtaining legal assistance, or adducing evidence. Notwithstanding a clause (section 282) providing for appeal to Circuit, the proceedings were held to be so illegal and oppressive as to make suspension by the High Court competent.

In *Jamieson and others* v. *Mackay*,[2] a conviction obtained against young boys under the General Police Acts, 13 and 14 Vict., cap. 33, and 19 and 20 Vict., cap. 103, in somewhat similar circumstances, was quashed in respect of the oppressive nature of the proceedings. Lord Deas made the following remarks,[3] which are instructive, as showing that an oppressive use may be made of procedure in itself regular and competent in some cases:—"There are here two grounds of suspension—incompetency and oppression. I agree "that in certain circumstances there is no absolute "incompetency in proceeding summarily as was "here done. I think the statute gives the power "with a view to certain exigencies, but not with a "view to the power being exercised in all cases. "It is a power to dispense with the usual deliberation and forms of procedure. . . . . If the "dispensing power, for as such I regard it, is acted "on without its being necessary to act on it, great "care must be taken that there are no grounds for "suspecting injustice in the result, otherwise the "proceedings may be set aside on the ground of "oppression."

(2) Material deviations in point of form.

(2), Such deviations, in point of form, from the statutory enactments as the Court shall think took

[1] H. C., Feb. 27, 1858, 3 Irv. 29.
[2] H. C., Nov. 24, 1862, 4 Irv. 246.
[3] 4 Irv. 250.

place wilfully, or have prevented substantial justice from having been done.

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This is an important and salutary limitation, and one which has saved many a judgment where the proceedings have been irregular, but not productive of injustice.

(2) Material deviations in point of form.

The following cases serve to illustrate the application of this provision :—

Section 3 of the Act enacts that causes are to proceed upon summons or complaint in the form of schedule (A). In schedule (A) the pursuer is directed "to insert the origin of debt or ground of action." Where in an action of damages the origin of debt or the ground of action was not set forth, but the account produced bore to be for goods sold, an appeal was sustained on the ground that the true ground of action and the account were inconsistent, and that it was material that the ground of action should be stated.[1]

On the other hand, where the summons did not state the grounds of action, but referred to them as contained in a statement annexed, Lord Deas dismissed the appeal, holding that this informality, if such it was, had not prevented the appellant receiving substantial justice.[2]

It is not *per se* a relevant ground of appeal that the summons simply refers to an account annexed. See *Mowat* v. *Martine*, H. C., 20th June 1856, 2 Irv. 435; and *Aitken* v. *Learmonth*, Stirling, 27th April 1855, 2 Irv. 156, to the same effect.

Section 11 of the Act provides that where a defender intends to plead any counter account or claim, he must serve a copy on the pursuer, "otherwise the same shall not be heard or allowed to be "pleaded, except with the pursuer's consent." In *Weatherstone* v. *Gourlay*,[3] the Sheriff gave effect to

[1] *Glasgow and South-Western Railway Company* v. *Wilson*, Glasgow, May 5, 1855, 2 Irv. 162. That case was regarded as not a sound decision in *Sturrock* v. *Anton*, 5 Irv. 236, by Lords Neaves and Ardmillan, on the ground that the Judges somehow went into the merits of the case, which was not competent.

[2] *Grange* v. *Mackenzie*, Glasgow, Sept. 28, 1866, 5 Irv. 324.

[3] Jedburgh, April 13, 1860, 3 Irv. 589.

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a counter claim which was admitted, but in regard to which no notice had been served. An appeal against this judgment was dismissed by Lord Ardmillan, who held that justice had been done, and that the deviation from the statute was not material.

The Sheriff, in an action for the amount of business accounts, decerned against the defender for the amount "subject to taxation" on 9th July. The Auditor's report, which was dated 15th July, was neither seen nor approved of by the Sheriff, but the pursuer in the action, who was Sheriff-clerk-depute, issued an extract decree in his own favour for the taxed amount and expenses, dated 9th July. In an appeal it was pleaded, founding on section 13 of the Act, that the remit should have preceded the Sheriff's judgment, and that he was bound to find in specific terms the precise amount of the sum decerned for (Schedule No. 7). It was held that there had been a wilful departure from the provisions of the Act; the appeal was sustained, and the Court remitted to the Sheriff "to proceed with "the case in accordance with the statute."[1]

Without multiplying instances, the following cases may be consulted in which deviations were held *not* to be material:—

Flowerdew v. *Reid*, Perth, 30th Sep. 1852, 1 Irv. 91; *Sinclair* v. *Rosa*, Glasgow, 25th April 1863, 4 Irv. 390; *Scottish North-Eastern Railway Company* v. *Cargill*, Dundee, 13th Sep. 1866, 5 Irv. 298; *Bissell and M'Caig* v. *Buchanan*, Glasgow, 4th May 1871, 2 Couper, 43.

Some statutory directions as to procedure are of so specific and peremptory a nature that neglect of or deviation from them is sufficient to render appeal competent under such a clause, without inquiring whether the neglect or deviation complained of was wilful or productive of substantial injustice. In *Mahon* v. *Morton*, already noted, where there

[1] *Guthrie* v. *M'William*. Ayr, Sept. 23, 1856, 2 Irv. 476. See also *M'Allister* v. *Cowan*, 1 Couper, 302, an appeal under 31 and 32 Vict., cap. 123.

was a limited right of appeal (13 and 14 Vict., cap. 33, sec. 369), in the same terms as those in the Small Debt Act, a refusal by the Magistrate of a motion for delay was not noted by the Clerk, although it was specially directed that this should be done by section 6 of certain rules and regulations framed under the authority of section 349 of the Act, and having the force of statutory enactments. The Lord Justice-Clerk (Hope) said,[1] "A "proved and notorious corrupt object on the part "of the Magistrate, is not what is to be prevented "or guarded against by these regulations. I can "understand that where no form whatever has "been prescribed for conducting such trials, it may "be necessary to aver wilful error. But where forms "have been prescribed by authority, they must "be observed in order to validate the conviction." And Lord Cowan said,[2] "Our power to judge "whether the grounds of refusal were justifiable, or "whether justice did not require delay to be "granted, is not to be interfered with by the Clerk's "non-compliance with this regulation. The object "of it was to prevent the necessity of that proof "we have had to order and now before us."

APPEAL UNDER 1 VICT. CAP. 41. Grounds of appeal. (2) Material deviations in point of form

(3), Incompetency, including defect of jurisdiction of the Sheriff.

(3) Incompetency.

More difficulty is found in defining the precise limits of this ground of appeal than those of the grounds already mentioned.

Where the Sheriff entertains a case plainly beyond his jurisdiction, or one which on the face of the proceedings is incompetent, there is no difficulty. But where he has to decide mixed questions of fact and law, or questions of law which partly depend upon the facts of the case, it is not easy to draw the line between those decisions which involve such incompetency as to admit of appeal, and those which are truly on the merits, or deal with such questions of law as it was the inten-

[1] 2 Irv. 391. [2] 2 Irv. 393.

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Grounds of appeal.

(3) Incompetency.

tion of the statute should be left to the final decision of the Sheriff.

Under this head is included not only defect of jurisdiction but want of jurisdiction, of whatever kind.[1] In other words it is competent to appeal on the ground of any excess of jurisdiction on the part of the Sheriff. Excess of jurisdiction, again, may be held to include not only the case of the Sheriff exceeding his powers but also the converse, namely, his refusing to exercise the jurisdiction which he possesses. As Lord Justice-Clerk Inglis said in the case of *Dick*,[2] "The Sheriff in holding "that there is bad service, was in effect holding "that there was no ground for his own jurisdiction "as Sheriff. In that respect I think the Sheriff "has gone wrong in a matter which does not come "here to be set right in a process of review, but "which really amounts to an excess of jurisdiction, "because it is a great constitutional maxim, '*Judex* "'*tenetur impertiri judicium suum.*' And whenever "that rule is not followed by a Judge refusing to "exercise his jurisdiction, he is committing an "excess of power which is the same in kind as if "he were exercising jurisdiction over a subject-"matter or territory over which he had no "jurisdiction."

This view is confirmed by the consideration that it is the presumed intention of the Legislature in such clauses to enumerate all competent grounds of appeal, and among them a refusal to exercise jurisdiction, which is quite as serious an obstacle to substantial justice being done as an excess of jurisdiction in the ordinary sense of the term. If not included under this head such cases must fall under the head of oppression. The result of any other view would be either to give no right of review in such cases, or to leave them to be dealt with by the High Court under its ordinary powers; thus

[1] *Graham* v. *Mackay*, Feb. 25, 1845, 7 D. 515, and 6 Bell's App. 214.
[2] 3 Irv. 620.

making two Courts of review, which is against the scope of the section.

Appeal under 1 Vict. cap. 41.

The following cases show some of the difficulties connected with this ground of appeal:—

Grounds of appeal. (3) Incompetency.

In *Buchanan* v. *Glasgow Corporation Water Works Commissioners*,[1] it was pleaded before the Sheriff by the defender that the account sued on was prescribed; the Sheriff repelled the plea. The defender having appealed, partly on the ground that the Sheriff had erred in repelling the plea of prescription, the respondent objected that this was not a competent ground of appeal. Lord Ardmillan sustained the objection, and said, "The plea of "prescription was disposed of by the Sheriff. "He may have done so erroneously—I don't say "he did—but I cannot review his judgment upon "it."

On the other hand, in a case where the plea of prescription had also been repelled by the Sheriff, an appeal was sustained in respect that; (1) the account sued on had *ex facie* undergone the triennial prescription; (2) it was admitted that no writ was produced; (3) the oath of the debtor was not taken; and (4) there was no express admission of resting-owing. Lord Neaves gave the following reasons for sustaining the appeal.[2] "The ground "upon which I proceed is not that on which the "appellant mainly rested his case, viz., malice and "oppression, of which I see no trace, but another "of the statutory grounds of review, viz., incom-"petency. This account has, on the face of it, "undergone the triennial prescription; and so, "under an Act of Parliament, the only way in "which it could be proved was by the debtor's "writ or oath. It is conceded that there was "neither writ nor oath here, and it is further "evident that there was no express admission of "the claim as resting-owing." In commenting on

[1] Glasgow, Sept. 19, 1862, 4 Irv. 225.
[2] *Murray* v. *Mackenzie*, Inverness, April 21, 1869, 1 Couper, 247.

APPEAL UNDER 1 VICT. CAP. 41.

Grounds of appeal.

(3) Incompetency.

the case of *Buchanan* he said,[1] "That case is not "quite analogous. The question there was as to "the continuity of the account sued for.[2] If the "account was continuous, as the Sheriff held it "was, then no part of it was prescribed." Here the last item is dated in 1855.

The distinction between the cases seems to be that if on the face of the proceedings it is plain that the Sheriff has flagrantly disregarded an important legal rule like the triennial prescription, the incompetency of his proceedings is established without the necessity of inquiry. If, on the other hand, in order to decide the point of law, the Sheriff has had to investigate or consider facts or documents which are not properly before the Court of appeal, and if the correctness of his judgment depends on the view taken of those facts or documents, the Court will not in ordinary circumstances interfere.

Thus, where the Sheriff allowed parole proof of a verbal agreement and subsequent actings, by which it was sought to modify or explain a written discharge, the Court refused to interfere, the Lord Justice-Clerk (Moncreiff) saying,[3] "The question "whether parole proof should have been allowed "in the circumstances is one of law, and is pecu-"liarly for the determination of the Sheriff. At all "events this Court cannot review judgments of "that class, as they are not within the statutory "grounds of appeal. If the Sheriff declined to "allow a proof to the defender, while he allowed it "to the pursuers, that would have been a different "and a more serious matter; but this appeal is "not taken on that ground."

But where the account annexed to a small debt summons showed no ground in law for the action, an appeal from a judgment against the defender

[1] 1 Couper, 248.
[2] This does not appear from the report. 4 Irv. 225.
[3] *Hair* v. *Nicol's Trustees*, Glasgow, 4th May 1871, 2 Couper, 40.

was sustained, Lords Ardmillan and Neaves holding that "The Circuit Court could certainly not "enter into the merits of a small debt case; but if "the account annexed was so defective as this, the "whole proceedings before the Sheriff had been "incompetent, and the Circuit Court must have "power to give redress."[1]

APPEAL UNDER 1 VICT., C. 41.

Grounds of Appeal. (3) Incompetency.

Sometimes the objection of "incompetency," when examined, is found to be truly an objection on the merits, and so not a good ground of appeal. See *Aitken* v. *Learmonth*, Stirling, April 27, 1855, 2 Irv. 156; *Paterson* v. *Mackay*, Glasgow, Sept. 27, 1872, 2 Couper, 327; *Mosson* v. *Brash*, Glasgow, Sept. 27, 1872, 2 Couper, 325.

Disposal of the Case by the Circuit Court.—The appeal is heard and determined in open Court, and in other respects the procedure is substantially the same as in appeals under the Jurisdictions Act. There is an important provision to the effect that it shall be competent to the Court, instead of finally setting aside the judgment, to correct "such deviation in point of form"—that is, such deviations as they shall think took place wilfully, or have prevented substantial justice from having been done—or to remit the cause to the Sheriff with instructions for a rehearing generally. In the case of *Murray* v. *Mackenzie*[2] just mentioned, a remit was made to the Sheriff to proceed with the cause, having regard to the provisions of the Act 1579, cap. 83. In *Guthrie* v. *M'William*,[3] the same course was followed.

It is also declared that "it shall not be competent to produce or found upon any document as "evidence on the merits of the original cause "which was not produced before the Sheriff when "the case was heard, and to which his signature "or initials have not been then affixed, which he is "only to do if required, nor to found upon nor

[1] *Scottish North-Eastern Railway Company* v. *Matthews*, Dundee, 25th April 1866, 5 Irv. 237.
[2] 1 Couper, 247, per Lord Neaves.
[3] Ayr, Sept. 23, 1856, 2 Irv. 476.

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"refer to the testimony of any witness not exa-
"mined before the Sheriff, and whose name is not
"written by him when the case is heard upon the
"record copy of the summons, which he is to do
"when specially required to that effect."[1]

This also is a salutary provision, and one strictly adhered to. It is of great importance that conflicting statements should not be made to the Court of review as to what documents were produced or witnesses examined in the inferior Court. Under this clause the Court have only to look at the documents and the record copy of the summons to see whether the documents in question were produced or the witnesses examined in the Court below. If the documents are not signed or initialed by the Sheriff, or if the witnesses' names are not written on the summons, the Court are bound to proceed on the footing that they were not produced or examined, unless it is specifically averred that the Sheriff was asked to initial or note them, and refused to do so. The words are peremptory —"it shall not be competent to produce" . . . "nor to found upon, nor refer to," &c.

How far the jurisdiction of the Court of Justiciary is privative.—In cases brought under the Act the jurisdiction of the Court of Justiciary is privative, and that of the Court of Session is excluded.—*Graham* v. *Mackay*, 7 D., and 6 Bell's App. Cases, 214; *Miller* v. *Henderson*, 12 D. 656.

But where the proceedings have been so irregular and outwith the statute as to be fundamentally null and illegal, there is authority for holding that the rule applicable to all such cases applies, viz. that the power of the supreme Court to interfere revives, that Court being, in criminal cases, the High Court of Justiciary, and, in civil, the Court of Session. Now, in civil cases the jurisdiction of the Court of Justiciary is wholly dependent on the statute, and it may fairly be said that, where the

[1] Sec. 31.

Jurisdiction of Court of Justiciary.

proceedings are outwith the statute the Court of Justiciary has no jurisdiction, or at least that the jurisdiction of the Court of Session is no longer excluded. But then it is said that section 31 provides for review not only in cases brought properly under the Act, but also in respect of "incompetency, in-"cluding defect of jurisdiction;" thus shewing that it was intended that the jurisdiction of the Court of Justiciary should be exclusive. This is a formidable answer where the objection is "incom-"petency or defect of jurisdiction." But there are cases which do not fall under the enumerated grounds of appeal; as where the proceedings are radically illegal and null, and where there is nothing to review, in the proper sense of the word. In such cases the Court of Justiciary are given no jurisdiction; and if that of the Court of Session were excluded, there would be no redress. If the Court of Justiciary has jurisdiction, it may fairly be contended that the Court of Session has none; but if the Court of Justiciary has not jurisdiction, the supreme Court in civil matters must be open. The difficulty is to say where "incompetency" ends and "nullity" begins.

This subject is more fully treated in Chapter VI., *infra*. It is sufficient at present to note some cases in which the jurisdiction of the Court of Session was sustained, notwithstanding sections 30 and 31.

In *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800, reduction of a small debt decree was held competent (*diss.* Lord Deas) where it was alleged that the decree had been altered by the Sheriff-clerk several days after extract, so as to cover a larger sum than that decerned for by the Sheriff, and which it originally bore. The majority regarded the document as a nullity, and not as a decree of the Sheriff pronounced under the Act.[1]

In *Manson* v. *Smith*, Feb. 8, 1871, 9 Macph.

[1] This decision was to some extent rested on the fact that the vitiation occurred *post causam*.

APPEAL UNDER 1 VICT., C. 41.

492, a suspension in the Bill Chamber was entertained where it was objected that the Sheriff-clerk-depute signed in his official capacity a small debt summons which was raised at his instance as an individual. Lord Benholme dissented.

In *Shiell* v. *Mossman*, Nov. 7, 1871, 10 Macph. 58, the competency of a suspension in the Bill Chamber was sustained, in respect of irregular proceedings following upon a small debt decree.

SECTION III.

APPEALS TO THE CIRCUIT COURT OF JUSTICIARY UNDER OTHER ACTS OF PARLIAMENT.

In many penal statutes there is given a right of appeal to the next Circuit Court of Justiciary for the district; but as the mode of appeal thus given is almost invariably either that provided by the Jurisdictions Act, incorporated at length or by reference, or modified, as in the Small Debt Act, it is unnecessary here to do more than refer to the two preceding sections of this chapter.

At the same time, it must be remarked that sometimes procedure is enjoined which is not identical with that by the Jurisdictions Act, on the one hand, or the Small Debt Act on the other; and this makes it indispensable to examine each statute carefully.[1]

The following may be taken as examples of such appeal clauses.

Section 4 of 34 and 35 Vict., cap. 32 (Criminal Law Amendment Act), runs thus:—

"In Scotland it shall be competent to any person to appeal against any order or conviction under this Act to the next Circuit

[1] See 25 and 26 Vict, cap. 35, sec. 33.

Court of Justiciary, or where there are no Circuit Courts to the High Court of Justiciary at Edinburgh, in the manner prescribed by, and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of His Majesty King George the Second, chapter forty-three, in regard to appeals to Circuit Courts in matters criminal, as the same may be altered or amended by any Acts of Parliament for the time being in force.[1]

APPEALS UNDER OTHER STATUTES.

"All offences under this Act shall be prosecuted by the Procurator-Fiscal of the County."

Here the provisions of the Jurisdictions Act are incorporated by reference *per aversionem*.

The appeal clauses of the Glasgow Police Act, 1866, 29 and 30 Vict., cap. CCLXXIII, are as follows :—

Sec. 131.—"No warrant granted by the Magistrate or citation made in pursuance of the provisions of this Act, and no charge or complaint, and no proceeding or trial before the Magistrate, and no order or sentence of the Magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocation, or appeal, or to any other form of review or stay of execution, unless in manner and on some one or more of the grounds hereinafter mentioned."

Sec. 132.—"Any person who feels aggrieved by any order or sentence of the Magistrate may, within fourteen days after its date, appeal to the Court of Justiciary at the next Circuit Court to be held at Glasgow, in the manner and under the rules, limitations, and conditions contained in an Act passed in the twentieth year of the reign of His Majesty King George the Second, chapter forty-three, 'for taking away and abolishing Heritable Jurisdictions in Scotland,' on the ground of corruption, malice, or oppression on the part of the Magistrate, wilful deviations in point of form from the statutory enactments, incompetency, or defect of jurisdiction, but on no other ground."

Sec. 133.—"Such appeal shall not operate as a suspension or stay of execution of any order or sentence of the Magistrate requiring the payment of any penalty, unless on consignment thereof in the hands of the Treasurer, nor of any order or sentence of the Magistrate awarding imprisonment, unless on sufficient caution to the satisfaction of the Magistrate for the appearance of the person appealing at such time and place as he shall direct, and that without prejudice, in either case, to the caution or security

[1] For instance, sec. 11 of the Summary Prosecutions Appeals Act, 1875, makes an alteration as to the time of taking an appeal in certain cases.

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required by the said Act for taking away and abolishing Heritable Jurisdictions in Scotland."

The last example which need be given is from 25 and 26 Vict., cap. 35 (The Public Houses (Scotland) Act Amendment Act), the appeal clauses of which differ slightly from those last quoted, and do not incorporate by reference the provisions of 20 Geo. II., cap. 43:—

Sec. 33.—"It shall be competent to any person conceiving himself aggrieved by any warrant, sentence, order, decree, judgment, or decision, made or given by any Sheriff, Justice, or Justices of the Peace, or Magistrate, in any cause, prosecution, or complaint, raised under the authority of the recited Acts, or of this Act, for breach of certificate, or for trafficking in spirits or other excisable liquors without a certificate, to bring the case by appeal before the next Circuit Court of Justiciary, or where there are no Circuit Courts before the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions which shall from time to time be prescribed by the said High Court of Justiciary: Provided always that such appeal shall be competent only when founded on the ground of corruption, or malice and oppression on the part of the Sheriff, Justice or Justices of the Peace, or Magistrate, as the case may be, or on such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done: Provided also that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form: Provided further, that notice in writing of such appeal shall be given to the opposite party, and to the Clerk of the Court pronouncing such warrant, sentence, order, decree, judgment, or decision, within eight days of the date thereof, and that no appeal shall be received or entertained unless the party appealing shall, along with his appeal, deposit with the Clerk of the Circuit Court or of the High Court of Justiciary, as the case may be, a certificate under the hand of the Sheriff-clerk, Town Clerk, or Clerk of the Peace, or Clerk to the Magistrates, as the case may be, that he has made consignation in the hands of such clerk of the whole sum and expenses, if any, decerned for by the warrant, sentence, order, decree, judgment, or decision appealed from, and unless he shall have found sufficient security for the whole expenses which may be incurred and found due under the appeal: Provided always that nothing herein contained shall be held to exclude or interfere with the right of appeal to Quarter Sessions, which at present exists, provided the appellant shall forthwith deposit with the Clerk of the Peace the amount of penalty and costs awarded against him."

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Sec. 34.—"No warrant, sentence, order, decree, judgment or decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Acts, or of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review, or stay of execution, on any ground, or for any reason whatever, other than by this Act provided."

The following statutes are a few out of many containing such appeal clauses :—

13 Geo. III., cap. 54, secs. 11-13—Game Act.

5 and 6 Will. IV., cap. 63, sec. 38—Weights and Measures Act.

20 and 21 Vict., cap. 148, sec. 96—Tweed Fisheries Act.

25 and 26 Vict., cap. 97, sec. 28—Salmon Fisheries (Scotland) Act.

25 and 26 Vict., cap. 101, sec. 430—Police Improvement Act.[1]

The right of appeal to the Circuit Court is usually coupled with a declaration that no other mode of review shall be competent. As to how far such clauses exclude the jurisdiction of the High Court of Justiciary, see Chapter VI. *infra.*

[1] Quoted p. 47, *supra.*

CHAPTER V.

Application by Petition to the High Court of Justiciary in Extraordinary Circumstances.

In addition to its powers of review, the High Court of Justiciary, as the supreme Court in criminal matters, has, in respect of its *nobile officium,* the power of interfering in extraordinary circumstances, for the purpose of preventing injustice or oppression, although there may not be any judgment, conviction, or warrant brought under review. Numerous instances of the exercise of this power are to be found in the Books and in the Records of the Court of Justiciary; but the limits of this work will not admit of an examination of the older cases. The following comparatively recent cases will serve as illustrations :—

Petition for recal of sentence of outlawry and relief from penalty in bond of caution.—In the case of *Marion Lindsay or Webster, and Others,* H. C., Nov. 29, 1858, 3 Irv. 285, a petition was presented by the widow and cautioner of one Alexander Webster, against whom sentence of outlawry had been pronounced at the Circuit Court of Glasgow in April 1856, praying that the said sentence should be recalled, and that the cautioner should be relieved from the penalty in his bond, on the ground that Webster was dead at the time when sentence was pronounced. The petition was not opposed by the Crown, and the Court pronounced the following interlocutor :—

"29*th November* 1858.—The Lords Commissioners of Justiciary having heard counsel for the petitioners, and considered the petition and productions made therewith, together with the

letter of the Crown Agent, also produced, stating that no opposition would be made on the part of the Lord Advocate, Recal the sentence of outlawry mentioned in the petition, pronounced against the deceased Alexander Webster on the 29th day of April 1856: Declare the moveable goods and gear of the said deceased freed from the escheat of the Crown, and free and relieve the petitioner, Thomas Barclay, from the penalty contained in the bond granted by him for the appearance of the said Alexander Webster."

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Again, in the case of *Michael Hinchy*, H. C., July 18 and 20, 1864, 4 Irv. 559, a petition was presented by Michael Hinchy for recal of a sentence of outlawry pronounced against him at Perth Circuit Court in May 1864. The petitioner, who had again been apprehended, alleged that he had failed to appear at the Circuit Court in consequence of illness, and that, in order to enable him to prepare for his defence, it was necessary that the sentence of fugitation and outlawry should be recalled. The Crown opposed this application on the ground that the statements in the petition were untrue, and that it was believed that, if reponed, the petitioner would offer bail and abscond.

Notwithstanding the opposition of the Crown, the Court, "in the whole circumstances of the "case," reponed the petitioner against the sentence of outlawry.

Although sentence of fugitation or outlawry is not competent in inferior Courts, the above precedents may be of use in cases in which bonds of caution have been forfeited in similar circumstances. In such cases, either the accused or his cautioner may apply to the Court by petition.

Petition for interim liberation pending appeal.—On 30th May 1867 John Pirrie was convicted before the Justices of the Peace in Petty Sessions, upon a complaint which charged a contravention of 13 and 14 Vict., cap. 92 (Prevention of Cruelty to Animals (Scotland) Act), and sentenced to six weeks imprisonment. Pirrie appealed against this sentence to the next Quarter Sessions for the County of Edinburgh, and, pending appeal, presented a petition to the

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High Court of Justiciary, praying for *interim* liberation. The Court, notwithstanding a doubt as to the competency of the petitioner's appeal to Quarter Sessions, granted the prayer of the petition, under certain reservations inserted in the interlocutor. The Lord-Justice Clerk (Inglis) said:[1] "I have "great difficulty as to the competency of the appli- "cation. Perhaps it will be sufficient for the "justice of the case to find that a *prima facie* case "has been made out. Suppose the appeal is found "competent by the Justices in Quarter Sessions, "and the judgment of the Justices in Petty Ses- "sions is reversed, the petitioner would have "served out his sentence, which would ultimately "have been found illegal. Although the procedure "in the petition may not be quite regular, I think "that the necessity of the case may warrant the "Court in relieving the petitioner by granting "interim liberation, the question as to the com- "petency of the appeal being always reserved to "be discussed when the case comes before the "Quarter Sessions."

The Court pronounced the following interlocutor:—

"The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered this petition, and heard counsel *hinc inde*, the Procurator-Fiscal not opposing, and without prejudice to any objection that may be stated to the competency of the appeal to the Quarter Sessions against the judgment of the Justices, and in the circumstances set forth in the application, Grant warrant for the interim liberation of the petitioner on his finding caution in the Justice of Peace Court Books of Edinburgh to the extent of £10 sterling, that he shall return to prison, and undergo the unexpired period of the imprisonment under the sentence, in the event of his appeal to the Quarter Sessions being dismissed or disallowed."[2]

In this case the application for liberation was considered and granted by a quorum of the Court. But it is believed that there have been cases in

[1] *Pirrie* v. *List*, H. C., June 8, 1867, 5 Irv. 433.
[2] *Ibid.*, p. 436.

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which *interim* liberation pending appeal has been granted by a single Judge. It may have been observed that, while under sec. 36 of 20 Geo. IV., cap. 43, the finding of caution is a necessary condition of a well taken appeal, nothing is said as to liberation of the prisoner pending appeal. In practice, the appellant, if in prison, is liberated on finding caution; but cases have occurred under statutes containing appeal clauses similar to those in 20 Geo. II., cap. 43, in which the Magistrate has refused to grant *interim* liberation, doubting his power to do so in the absence of express statutory authority. It is thought that where there is a right of appeal subject to finding caution or making consignation, there must be an implied right to obtain *interim* liberation in the absence of statutory direction on the matter.[1] And if so, it would entail hardship on an appellant to postpone consideration of his petition until a quorum of the Court could be called together. Before this could be done the term of imprisonment might have expired. But a good deal will depend upon the circumstances of the case. If the hardship complained of arises simply from the inferior Judge declining to exercise powers which he undoubtedly possesses, a single Judge might competently interfere; while it might be otherwise if the difficulty arose from want of statutory direction or power, which really prevented the inferior Judge from granting the redress sought.

Petition for Liberation pending Trial.—In the case of *William Taylor Keith*, H. C., June 4, 1875, 3 Couper, 113, an appeal to the *nobile officium* of the Court was made, which raised the important question whether the Court have the power of

[1] See sec. 3, subdivisions 1 and 6, of The Summary Prosecutions Appeals Act, 1875, and notes 8 and 15 to sec. 3. The terms of these subdivisions raise a curious question as to whether the appellant is entitled to *immediate* liberation on caution or consignation, and if not, whether it is competent to apply to the High Court for *interim* liberation before the case is lodged in the superior Court.

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authorising the liberation of a prisoner on account of delay in bringing him to trial, when he is unable through poverty to force on his trial, under the Act 1701, cap. 6. The circumstances were these :—The petitioner was committed for trial on 29th September 1874; he was indicted for the Glasgow Winter Circuit of that year, but an objection to the relevancy of one of the charges having been sustained, the diet was deserted *pro loco et tempore.* He was again indicted for the Spring Circuit held in April 1875, but the diet was not called, although counsel for the panel moved that this should be done; the Court declining to interfere with the discretion of the public prosecutor. Being still in custody, and no new libel having been raised, the petitioner, on 17th May, presented a petition for liberation to the High Court of Justiciary, setting forth the delay which had occurred, and stating that on 29th January 1875 he had made the Crown authorities aware that he had caused letters of intimation to be expede under the Act 1701, cap. 6; but that his poverty prevented him getting delivery of the said letters, so as to make formal intimation to the Lord Advocate, unless the Crown relieved him of the usual revenue duty of 17s. 6d. exigible thereon, and that his request had been refused.

It was argued for the petitioner that "the Crown "authorities were made aware that he had obtained "the usual letters of intimation on 29th January "1875, and that he was unable to pay either the "government duty or the expense of formal inti-"mation by a messenger-at-arms. They ought "therefore either to have relieved him of the duty, "or to have agreed to hold him in the same situa-"tion as if the letters had been formally intimated. "This of itself is sufficient to entitle the petitioner "to have the warrant of commitment of 23d "December 1874 recalled, and liberation granted "under his present petition. The Court were in "use to grant liberation on cause shown before the

"passing of the Act 1701 (Hume, vol. ii., pp. 265, "6, 7). They have still that power, and the present, under all the circumstances, is a case of "oppression in which the power ought to be "exercised."

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For the Crown an explanation was given of the causes that led to delay in bringing the petitioner to trial; and further, it was contended that the Act 1701, cap. 6, alone regulates the discharging of warrants of apprehension and commitment, and that the Court could not hold that there was here intimation to the Lord Advocate under that Act. It was stated, however, by the Solicitor-General that a new indictment would forthwith be served on the petitioner.

In respect of this assurance the prayer of the petition was refused; but the Court expressed an opinion that where there was no sufficient cause for delay in bringing a prisoner to trial, they had the power, and that it would be their duty, in the absence of sufficient explanation on the part of the prosecutor, to grant liberation pending, but not as a bar to, trial.

Petition to compel Public Prosecutor to grant his Concourse to a Private Prosecution at the Petitioner's instance; or otherwise, should he refuse, to grant leave to the Petitioner to prosecute at his own instance without the Public Prosecutor's concurrence.—This interesting question was considered by the High Court of Justiciary in the case of *Angus Mackintosh*, H. C., Nov. 4, 1873, 2 Couper, 367. The Court were of opinion that in that particular case the prayer of the petition should be refused; but the majority expressed an opinion that they had the power, should a suitable occasion arise, to grant the relief sought.

Lord Ardmillan said,[1] "I do not entertain any "doubt, and I rather think your Lordships are of "the same opinion, that if a case were made out

[1] 2 Couper, 374.

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"showing that the Lord Advocate ought to have "given his concourse, and was capriciously, wrong-"fully, or oppressively withholding it, this Court "could interpose. Such a case may be supposed "in argument. It is scarcely conceivable in fact. "But if it should occur it would be a wrong, and "it would not be without remedy. I think that "we have the authority of Sir George Mackenzie, "and the recent authority of certain very valuable "and weighty observations made by the Judges in "the attempted prosecution of Hare after Burke's "trial, to sustain the proposition that we could "give redress by permitting, in the particular circum-"stances of such an exceptional case, the prosecu-"tion to proceed at the instance of the private "prosecutor without the concourse of Her Majesty's "advocate. But it must be obvious to all that "nothing but very grave and extraordinary circum-"stances could possibly warrant the Court to take "such a proceeding."

The Lord Justice-Clerk said [1]—"It is not, I think, "in the power of the public prosecutor at all times "both to refuse himself to prosecute, and refuse his "concourse to the private prosecutor capriciously, "oppressively, or unreasonably, and so prevent all "prosecution at the instance of a private party. "There is a remedy should such a case occur, "although fortunately for this country it has very "rarely been required. . . . I incline to the opinion, "as I said formerly, that we have power either to "permit the private prosecutor, on good cause "shown, to proceed without concourse, or to ordain "the public prosecutor to grant his concourse. I "think either course competent, and I find that in "his second volume, p. 126, Baron Hume lays "down the law substantially in that way. . . . If, "then, the petitioner here had shown the Court "good ground upon which to exercise this power, "or to lead us to suppose that the Lord Advocate

[1] 2 Couper, 378.

"had acted otherwise than with reasonable discre-
"tion in the special circumstances of this case, we
"could have taken whichever step we considered
"most proper."

Lord Neaves[1] doubted the power of the Court to compel the Lord Advocate to concur, and also their power to grant criminal letters to a private party to prosecute without the Lord Advocate's concurrence.

Such a case is not likely to occur often, but it serves to show the extent of the powers possessed by the High Court of Justiciary.

[1] 2 Couper, 375.

CHAPTER VI.

On Objections to the Jurisdiction of the Court of Justiciary, and on the Finality of Convictions and Judgments of inferior Courts.

In civil causes the jurisdiction of the Court of Justiciary is limited by the statutes which confer it. On the other hand, in criminal matters the jurisdiction of the Court of Justiciary cannot, in one sense, be excluded. It can always afford redress against irregularities or abuse of statutory powers, notwithstanding the most express declaration that review shall not be competent. In a wider sense, the Court of Justiciary is said not to have jurisdiction, when review is entirely or partially excluded by the statute, and that either expressly, or by necessary implication; although, perhaps, to speak correctly, it should be said, not that jurisdiction is excluded, but rather that convictions and judgments pronounced under such statutes are made final, and suspension, advocation, or appeal incompetent.

On the head of want of jurisdiction, the following are the objections most frequently urged against the competency of processes of review :—

1. *That the Jurisdiction* quoad *Review is civil.*

Previously to the passing of the Summary Procedure Act, the only way in which to fix the Court of review, in the event of its not being specified by the special statute, was to ascertain whether the proceedings in question were of a criminal nature or not. This was often by no means an easy matter. In considering the 28th section of the Summary Procedure Act, some illustrations have already been given of the perplexing

questions which frequently arose previously to that Act, in regard to the limits of civil and criminal jurisdiction, in consequence of there being no decisive and accepted test, capable of being applied to all causes, by which to fix the Court of review. Tests there were, but unfortunately too many; and while many penal statutes contained provisions which tended to give the proceedings under them a criminal aspect, they had often just as many which could be plausibly appealed to in support of the contention that the jurisdiction was civil. One hackneyed subject of discussion was whether the subject-matter of the prosecution was *malum in se* or *malum prohibitum;* and if the latter, whether the nature of the procedure directed, and of the punishment which could competently be imposed, gave a criminal complexion to offences not in themselves of a criminal nature. Some Judges solved the question by considering whether the proceedings were *ad civilem effectum* or *in vindictam publicam.* But one is disposed to sympathise with Lord Deas in the perplexity which he experienced in applying this test. In *Blair* v. *Mitchell* he said:[1] "Of one thing I am very clear, that the question "whether this is to be held a civil or a criminal "proceeding cannot be determined by any abstract "definition of a criminal. It has been suggested "that everything is a criminal offence which is "made punishable by statute, with a view to deter "others from committing the like offence. I "cannot concur in that view. It would make "criminal all those innumerable acts which are "declared in police statutes, local and general, "to be offences subjecting parties to penalties. "Many of these acts do not even require to be "committed by the party who is held to be the "offender, and against whom the complaint is "directed. . . . The question, What is to be held "civil or criminal under any particular statute, can

OBJECTIONS TO JURISDICTION, &c.

(1) That the case is civil.

[1] 4 Irv. 551.

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

"only be solved by looking carefully at the words "of the statute itself and considering what the "Legislature really intended. When I come to do "that with this statute, I find the question very "perplexing. There are many things prohibited "in the statute which it is difficult to suppose the "Legislature could have intended to make criminal "offences. Take, for instance, the having in one's "possession foul or unseasonable salmon. It is "not necessary to constitute this offence that there "should be any guilty knowledge on the part of the "individual. It may be his misfortune, and not his "fault, that his fishmonger or his servants have "allowed foul salmon to be used at his table. "Nevertheless he may be subjected in the penalty. "But is he to be branded as guilty of a crime or "criminal offence? I am not prepared to come to "that conclusion. At the same time, I admit that "there is such perplexity in regard to the forms of "procedure directed by the Act, as to make it "almost impossible to form a satisfactory opinion, "whether the proceedings are meant to be civil or "criminal."

The subject is well illustrated by some important discussions and decisions upon the question whether in certain statutory prosecutions the respondent was competent or compellable as a witness for or against himself—this depending upon whether the proceedings were criminal in the sense of the Evidence Act, 16 and 17 Vict., cap. 20, sec. 3.

Cases held criminal.

Perhaps the most exhaustive statement of the tests usually applied is to be found in Lord Ivory's opinion in *Stevenson* v. *Scott*, Jedburgh, September 8, 1854, 1 Irv. 603. The question in that case was whether in a prosecution under 11 Geo. IV., cap. 54 (The Tweed Fishery Act), it was competent to examine the accused party who tendered himself as a witness. It was objected by the prosecutor that it was incompetent to examine the accused in respect that the prosecution was a criminal proceeding in

the sense of the Evidence Act, 16 and 17 Vict., cap. 20, sec. 3. The Sheriff repelled the objection, and the accused was examined as a witness, and thereafter assoilzied. The Procurator-Fiscal appealed to the Circuit Court.

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

It may be explained that the 51st sec. of the Tweed Fishery Act provides for the prosecution of offences, the recovery and application of penalties, and the imprisonment of offenders, failing payment or recovery. The following are its provisions as to imprisonment :—

"And in case sufficient distress or distresses shall not be found, or such penalty or penalties and costs shall not be paid, then it shall be lawful for any such Magistrate or Magistrates, and he and they is and are hereby respectively authorised, empowered, and required, for the first offence, to commit every such offender or offenders, to such gaol or house of correction as aforesaid, for any time not exceeding two months, or less than one month; for the second offence, any time not exceeding four months, or less than two months; and for the third and every other offence, for any time not exceeding six months, nor less than three months, or until such offender or offenders shall have paid such penalty or penalties, forfeiture or forfeitures, and all costs and charges attending such proceedings as aforesaid, to be ascertained by such Magistrate or Magistrates, or shall otherwise be discharged in due course of law."

Lord Ivory held the prosecution to be a criminal proceeding within the fair meaning of 16 and 17 Vict., cap. 20, and in respect thereof found it was incompetent to receive the evidence of the accused as a witness in the cause, either for or against himself. In his opinion his Lordship gave six reasons for his judgment; no apology is required for quoting some of them in full, as they have been frequently referred to with approval, as containing an exhaustive enumeration of the tests usually relied on as indicating that the proceedings were criminal.

"I.[1] The proceeding itself is one undoubtedly not *ad civilem effectum* but *in vindictam publicam*, and its end and object not the constitution and enforcement of a mere debt, but conviction as for an offence and sentence *in modum pœnæ*. It is true, as observed

[1] 1 Irv. 610.

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

for the respondent, that the offence lay in the commission more of a *malum prohibitum* than of a *malum in se*. But what the law declares to be an offence, there must, *in genere*, as implying a defiance and infringement of the law, be criminality in committing. Accordingly, had the statutory punishment been imprisonment, or a corporeal pain instead of a pecuniary penalty—itself, however, in certain cases, convertible into a limited imprisonment—there could have been no room for doubt.

"II. The form of proceeding as directed by the statute, or, in other words, the machinery for arriving at conviction and punishment, in like manner, savours throughout of criminal, and not of civil process. For example, the prosecution is to be at the instance of the public prosecutor or other corresponding official; the tribunal alternatively the Court of the Sheriff or Justices of Peace, but both, as the context shows, in the capacity of Magistrates; and Justices especially having no ordinary civil jurisdiction extending to the matter. Then the course of proceeding may be 'in a summary way,' and by 'warrant for bringing the parties complained of immediately before the Magistrate.' The determination and judgment is to have the form of conviction, and not of decree; and payment of the penalty in one, at least, of its shapes, is to be enforced by committal for a term specified 'to the common jaol or house of correction.'

"III. The mode of proof, which in this (as in many other statutes of analogous operation) is specifically pointed out, and provided for in the statute itself, seems by necessary implication to exclude the competency of resorting to the accused as a witness. Conviction is to proceed (1) 'on proof on oath by one or more credible witnesses,' *i.e.* witnesses other than the party; (2) On confession of the offence, *i.e.*, voluntary confession of the party as distinguished from extraneous witnesses in the form of judicial admission, examination, or otherwise, and not under the compulsitor of any oath, whether as witness or accused. Had the Legislature intended by the recent enactment to alter or overturn the mode of proof thus so precisely laid down in the whole of that numerous class of statutes by which the present and other similar offences are originated, and under which they have hitherto been dealt with, it is thought this must have been done, not inferentially, but by positive words. If so, in the absence of all express directions, it is thought that the proof in such statutory cases must continue to be that specifically introduced along with the offences to which it was made applicable in the different statutes themselves.

"IV. In connection with this view, it is most important to keep in mind, that it cannot be allowed to the accused in such cases to come forward as a witness on his own behalf without in principle introducing, as its counterpart, a corresponding right in the public prosecutor to adduce him as a witness against himself. But that would be a very strong conclusion to arrive at on mere implication or inference. and it certainly is a course hitherto

wholly unknown in practice. The answer seems still to be as good as ever, that in such matters no one is bound to criminate himself. But if, as the respondent contends, neither the offence nor proceeding partake of a criminal character, both being, according to him, wholly of a civil description, this answer could no longer be made."

OBJECTIONS TO JURISDICTION, &c.
(1) That the case is civil.

This decision was followed by the unanimous judgment of the whole Court,[1] in *Bruce* v. *Linton*, Dec. 13, 1861, 24 D. 184, where the same question arose under 9 Geo. IV., cap. 58, and 16 and 17 Vict., cap. 67. In that case the suspender, on conviction, was sentenced to pay a fine of £30, and in default of payment to imprisonment for four months. To this conviction the suspender urged various objections, one of which was that the Magistrate had improperly rejected his, the suspender's, evidence. The reasons given in support of this objection show how much could be said by an ingenious pleader in support of the view that the prosecution was a civil proceeding :—

"As to the objection that the Magistrate had improperly rejected the evidence of the suspender, that question depended upon whether the proceeding was a 'criminal proceeding,' in the sense of the Evidence Act, 16 Vict., cap. 20. The Act of 9 Geo. IV., c. 58, provided certain rules for granting certificates to publicans, and gave power to any member of the community to prosecute for a breach of such certificates; the power was not given to the Procurator-Fiscal, and the enforcement of the Act was made no part of public justice. Besides, by that Act, the summoning or citation of the party complained against was required, and this was inconsistent with a criminal proceeding. By the 30th section of the above Act any person might 'sue for and recover' the penalty. This was not the language appropriate to criminal proceeding. The act of selling spirits in itself was not illegal. It was merely *malum prohibitum*. The offence, therefore, was not criminal, and possessed none of the characteristics observable in criminal proceedings. The penalty was truly of the nature of a civil debt. Under the Act of Geo. IV. the party could not be imprisoned until he had failed to pay the penalty, and a certain time was allowed him to do so. The imprisonment was therefore not a punishment, but a means of enforcing payment. The alteration introduced by the 16 and 17 Vict. did not affect the character of

[1] Lord Deas was absent.

OBJECTIONS TO JURISDICTION, &c. (I) That the case is civil.

the proceeding. The imprisonment might be put an end to at any time by paying the penalty. No doubt the Justices might now grant warrant to apprehend, instead of citation, as required in the former Act; but this was not intended to change the character of the proceedings. The case of *Syme* v. *Murray* established (1), that in all matters truly criminal a public prosecutor was necessary; (2), that prosecutions for money penalties imposed by statute were not of a criminal nature, but were in the same situation as other debts where no provision was made for their recovery. Another test, showing that the proceedings were civil and not criminal, was, that under the statutes the presence of the party complained against was not indispensable, and he might be convicted in absence. Moreover, if the procedure were of a criminal nature, it would have been incompetent for the Court of Session to review it. It had been repeatedly decided both in this Court and in the High Court of Justiciary, that where the matter of offence was the violation of a statutory regulation, it was not a *malum in se*, but only *malum prohibitum*, and that review of a sentence in such cases was not competent in the Court of Justiciary."[1]

But these arguments did not prevail. Lord Ardmillan said:[2]

"It is difficult to obtain a satisfactory criterion for ascertaining whether statutory proceedings, such as the present, are of a civil or a criminal character.

"The old distinction between commutative and distributive justice—the first being *ad civilem effectum* for enforcement of right, or reparation of wrong, between man and man, and the second being *in vindictam publicam, in modum pœnæ*, for repression and punishment of offences—is, to my mind, important, and not to be lost sight of. Our best definitions of crime are quite consistent therewith. Baron Hume, in the first chapter of his great work on Crimes, says: 'I shall take that term (crime) in its ordinary acceptation, and shall consider every act as a crime for which our practice has appointed the offender to make some satisfaction to the public, besides repairing, where that is possible, the injury sustained by the individual. It is obvious that, in exacting any such atonement, the law always supposes that the delinquent has infringed, in some respect, those duties which he owes to the community. He has set a dangerous example of violence, dishonesty, falsehood, indecency, irreligion, or he has trespassed with respect to some of those other articles of wholesome discipline or wise economy which affect the public welfare, and are matters of general concernment.'

"The phraseology of the statute 16 and 17 Vict. points to the same result; for such terms as 'guilty,' 'offence,' and 'conviction'

[1] Suspender's Arguments, 24 D. pp. 188, 189. [2] 24 D. 192.

—such a quality or aggravation of the offence as previous conviction—and such a sentence or punishment for the offence as imprisonment in the prison of Edinburgh in default of immediate payment of a penalty,—all indicate, to my mind, the nature and character of the offence and of the proceedings; and all point to the conclusion that these are criminal.

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

"I am quite satisfied with the reasoning of Lord Ivory in the case of *Stevenson* v. *Scott* (Dec. 8, 1854, 1 Irv. 603), of Lord Kinloch in the present case, and of the Lord Chief Baron and Baron Parke in the case of *The Attorney General* v. *Radloff* (Law Journ., N. S., 23 Excheq., p. 240); and I do not think that with reference to the Evidence Act there is any conflicting authority.

"This prosecution is, in my opinion, a proceeding *in vindictam publicam* for punishment of 'an offence punishable on summary conviction.' Therefore it is 'a criminal proceeding within the meaning of the Evidence Act;' and if so, the defender or accused party cannot be competent or compellable to give evidence as a witness.

"This appears to me to be the sound construction of the statute, and to be, at the same time, in accordance with the principles or theory on which criminal procedure is distinguishable from civil procedure in our law."

The case of *Blair* v. *Mitchell*, H. C., July 9, 1864, 4 Irv. 545, which was decided immediately before the passing of the Summary Procedure Act, is to the same effect.

Cases held civil.

Without going into details, the following are some of the cases in which the proceedings were held to be of a *civil* character:—

Campbell v. *Young*, Feb. 24, 1835, 13 S. 535, under The Hawkers Act; *Dunlop* v. *Hart*, June 20, 1835, 13 S. 1173; *Macdonald* v. *Gray*, H. C., Feb. 17, 1844, 2 Broun, 107, under 6 Geo. IV., cap. 80, sec. 183; *Somerville* v. *Hemman*, H. C., June 1, 1844, 2 Broun, 220, under 5 and 6 Vict., cap. 107, secs. 19 and 21; *Phillips* v. *Steel*, Jan. 12, 1847, 9 D. 318, under 9 Geo. IV., cap. 58; *Campbell* v. *Strathearn*, H. C., Nov. 22, 1847, Arkley, 386, under 1 and 2 Will. IV., cap. 43; *Duncan* v. *Greig*, H. C., Feb. 7, 1848, Arkley, 421; *Addison* v. *Stevenson*, H. C., July 22, 1848, Arkley, 505; *Caldwell* v. *Baker*, Jan. 15, 1850, 18 D. 315; *Hill* v. *Dymock*, Nov. 18, 1856, 19 D. 47; *Gardner* v. *Porter*, Nov. 17, 1856, 2 Irv. 522;

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

Crichton v. *Grant*, Feb. 15, 1859, 21 D. 488; *Macdonald* v. *Young*, H. C., Jan. 20, 1862, 4 Irv. 154, under 23 and 24 Vict., cap. 151.

Definition in sec. 28 of the Summary Procedure Act, 1864, of the limits of civil and criminal jurisdiction.

It will have been observed, from some of the cases above described, that one test strongly relied on as indicating that proceedings were criminal, was that imprisonment, either immediate, or in default of payment or performance, was authorised by the statute; not for enforcement of the penalty or order, but in *modum pœnæ* being for a fixed period, at the expiry of which the respondent was entitled to liberation, although the penalty should not have been paid, or the order should not have been performed. This is the test adopted in the 28th section of the Summary Procedure Act, it being provided that

"In all proceedings, by way of complaint, instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature, where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil."

[The section will be found on page 108, *supra*.]

The cases to which the definition applies are those arising under "Acts of Parliament authorising conviction for offences, and the recovery of penalties and the enforcement of orders by imprisonment, upon summary complaint, before Sheriffs, Justices, and Magistrates in Scotland." It is thus confined to proceedings under statutory complaints.

The sole purpose of the definition is to fix jurisdiction—to indicate the Court of Review.—It does not in any other respect give a criminal character to the

proceedings. If the case is not *per se* of a criminal nature the proceedings will be regulated by the rules of civil process, except in so far as the statute may provide otherwise. The parties may be examined as witnesses for or against themselves—this is expressly provided; the concourse of the Procurator-Fiscal is not required; in a word, the only result of the definition is, that the conviction or judgment is reviewed by the Court of Justiciary, not by the Court of Session. If, for instance, any question is raised as to whether it is competent to examine a party as a witness, it must still be decided by a general examination of the statute, and the definition sinks into its former position of being simply one of many tests. On the other hand, the jurisdiction does not cease to be criminal because civil diligence is authorised, in addition to imprisonment, for a fixed period.—*Forbes* v. *Adair, supra,* p. 109. The only point to be ascertained is whether it is competent to ordain imprisonment *in modum pœnæ,* as part or as the whole of the sentence.

Objections to Jurisdiction, &c. (1) That the case is civil.

The application of the definition of criminal jurisdiction is tested not by the judgment pronounced, but by the sentence authorised.—It applies wherever "the Court shall be required, or shall be "authorised to pronounce" such a sentence, even although they may not pronounce it; as where the respondent is assoilzied, or where it is competent, but not imperative, to pronounce sentence of imprisonment, and where such sentence is not pronounced; *a fortiori* where imprisonment is ordained in default of payment, the jurisdiction is criminal, though the penalty is at once paid.

In order to ascertain whether such imprisonment is competent, the special statute should be carefully examined. Sometimes the penalties imposed are set forth in one part, and the mode of recovery in another; and it is only by examining the sections dealing with the latter that the matter can be ascertained. For instance, sec. 20 of the Public Health

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

(Scotland) Act, 1867, 30 and 31 Vict., cap. 101, imposes certain penalties, but the mode of recovery is not given until secs. 103 *et seq.* From secs. 103 and 105 it appears that in default of payment, imprisonment for a specified period is competent in certain cases, which therefore are criminal *quoad* review. Again, there are statutes which authorise imprisonment for a specified period in regard to some offences, and not in regard to others. Sec. 22 of the Mines Regulation Act, 23 and 24 Vict., cap. 101, imposes certain penalties, *first,* in respect of "the default of the owner or agent" of a pit, and *secondly,* in respect of the neglect or fault of "every person other than aforesaid." The punishments imposed under the *first* half of the sec. are confined to money penalties; in regard to those set forth in the *second,* imprisonment for any period not exceeding three calendar months is declared to be competent. Accordingly, cases falling under the first half have been dealt with as civil, and those under the second half as criminal.—*Macdonald* v. *Young,* H. C., Jan. 20, 1862, 4 Irv. 154; and *Nimmo* v. *Clark and Wilson, supra,* p. 104. In the former case, Lord Justice-Clerk (Inglis) said,[1] "But light is thrown on the question by what "follows in the 22d section. The second part of "the section applies to everybody employed in a "coal or ironstone mine, except the owner, agent, "or viewer, and what is said about them is that, "if they neglect or wilfully violate any of the "special rules they 'shall, for every such offence, "'be liable, upon a summary conviction for the "'same before two Justices of the Peace, or, in "'Scotland, before the Sheriff having jurisdiction "'in the county or place where the offence is com-"'mitted, to a penalty not exceeding £2, or to be "'imprisoned' for any period not exceeding three "months. The party is to be summarily tried, and, "if conviction follow, subjected to a penalty, or

[1] 4 Irv. 164.

"imprisonment in place of a penalty. That is as "like a punishment following on an offence as any-"thing can be. The first part of the section im-"poses a civil forfeiture, the second a punishment, "as for a criminal offence."

OBJECTIONS TO JURISDICTION, &c. (1) That the case is civil.

Some statutes impose penalties but give no directions as to their recovery. If complaints under such statutes are brought under the Summary Procedure Act, the appropriate form of conviction is that provided by the first half of subdivision (6) of section 18 of that Act, which authorises only imprisonment "until liberated in "due course of law," and, accordingly, such cases are civil *quoad* review.—See *Murray and Jones, supra,* p. 99; and *Morrison and Black* v. *Welch, supra,* p. 100; and section 28, note 4, of the Summary Procedure Act, p. 110.

When the Court has original jurisdiction it can also review.

In conclusion on this head, it may be mentioned that it has been held that, when original jurisdiction in civil cases is by statute conferred upon the Court of Justiciary, that Court has also the power of review in such cases.—*Giles* v. *Baxter,* H. C., March 15, 1849, J. S. 203, per Lord Justice-Clerk, p. 210.[1]

2. *That Review by the Court of Justiciary is excluded by the Statute under which the proceedings were taken.*

In order to oust the jurisdiction the Court of Justiciary, either as a Court of first instance or as a Court of review, the exclusion must be either express or necessarily implied. The following observations by Baron Hume in regard to the jurisdiction of the Court of Justiciary as a Court of first instance are also applicable to its jurisdiction as a Court of review. He says, vol. ii., p. 31:—

"In point of extent its jurisdiction in the trial of crimes may be

[1] The Statute was 6 and 7 Vict., cap. 68, sec. 19.

OBJECTIONS TO JURISDICTION, &c. (2) That review is excluded.

said to be almost universal. And *first*, it is hardly subject to any limitation with respect to the magnitude of the cause of complaint, and is open alike for the trial of the highest crimes and the more venial offences. How mean soever the injury, still, if it amount to a crime, and be cognisable to the effect of awarding punishment for correction or example, and would be the subject of a proper criminal process in any of the inferior Courts, the accusation may competently be laid before the Lords of Justiciary. There is no rule of limitation here, as in civil matters,—nor would it be easy or desirable to contrive one,—for confining the trial of the less important cases in the first instance to the inferior Courts; and the accused cannot well complain that he is tried by an assize, before the highest and purest Judicature of the kingdom, instead of some inferior and less enlightened Judge, who might proceed perhaps without any such assistance."

Again, at page 37 of the same volume he says,—

"To the exception of proper maritime causes I have only to add those few offences whereof the trial has been committed to other Courts by the express appointment of the Legislature. This seems to be the case with the crime of fraudulent bankruptcy, which the Act 1696, cap. 5, remits to the cognisance of the Lords of Session; and perhaps the same is true (though this is not so clear) as to that of wrongous imprisonment, which, by the Act 1701, c. 6, seems to be reserved for the same Judicature in those instances where the complaint is grounded on the new provisions of that valuable law, and concludes for the pecuniary amends there appointed for the party wronged.

"But here I must observe generally that to authorise a construction so unfavourable to our supreme criminal Judicature, which has a natural pretension to take cognisance of all offences, either the statute must bear a precise declaration on the subject, or the matter and circumstances of the enactment must be such as plainly to warrant an inference to that effect; as, for instance, if a statute create a new offence, and make special mention of certain Courts as competent to the trial, without alluding to or taking notice of any other. But with respect to any crime which is already known in the law, and is within the province of the Court of Justiciary, they are not despoiled of their jurisdiction, though this crime should be made the subject of additional and statutable provisions, in which notice is taken of other Judges as competent to dispense the law, and without any mention of the Court of Justiciary. The effect of such a law is only to bestow a jurisdiction on those Judges to which they could not otherwise have pretended, but cumulative always with that of the supreme Court, and subject to their review."

And again, at page 38,—

"Further still, in the construction even of those statutes which

create new offences, and have relation only to matters of revenue, or the like, it will not readily, or on slight grounds, or for doubtful expressions, be presumed that the Legislature have had a purpose of vesting the execution of criminal justice in any other Court, to the exclusion of the supreme. Any ambiguous clause or phrase will rather be construed in favour of this high tribunal, which, *de jure* and without the aid of statute, has a natural and inherent jurisdiction to try for crimes and offences of every sort as soon as the law has given them birth."[1]

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The law of England on the subject is thus stated by Lord Mansfield in *Rex* v. *Robinson*, 2 Burr. 803, and in the opinion of the Court in the case of *Harris*, 1791, 2 Leach, 551:—"Where a statute "creates a new offence by prohibiting and making "unlawful anything which was lawful before, and "appoints a specific remedy against such new "offence by a particular sanction and a particular "mode of proceeding, that particular mode of pro-"ceeding, and no other, must be pursued;[2] but "where the offence was antecedently punishable "by a common law proceeding, and the statute "prescribes a particular remedy by a summary "proceeding, either method may be pursued."

Where review is expressly excluded.

Accordingly, in those cases in which the jurisdiction of the Court of Justiciary has been held to be excluded, there has been in the penal statute a clause expressly excluding review, or it has been inferred from its terms and provisions that review is excluded by necessary implication; such exclusion being more readily inferred where the offence is of new creation. But such clauses do not prevent the interference of the supreme Court, if the proceedings complained of are not "under the "authority of the Act," either in respect of the prosecution not being competent under the Act, or of material deviations from its provisions.

By the 14th section of 2 and 3 Will. IV., cap. 68 (The Day Trespass Act), it is provided that parties

[1] Compare the cases of *William Trotter*, Jedburgh, Oct. 5, 1842, Bell's Notes to Hume, 74, and *James Cooper*, Glasgow, Sept. 19, 1842, 1 Broun, 389, with the case of *Robert Rowet*, Ayr, April 27, 1843, 1 Broun, 540.

[2] Quoted in *Rex* v. *Robinson* as being the resolution in *Castle's* case. Cro. Jac. 643.

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aggrieved may appeal to the Quarter Sessions on the observance of certain conditions therein specified; and by section 15 it is provided, "that no "conviction in pursuance of this Act, or judgment "given on appeal therefrom, shall be quashed for "want of form, *or be removed by advocation, suspen-"sion or reduction, into any superior Court of law.*" Here the exclusion of review is express; and provided the proceedings have been under the statute, the supreme Court cannot interfere.—*Porter* v. *Stewart*, H. C., March 22, 1858, 3 Irv. 57. But it will be otherwise if the proceedings have been outwith the statute, or if there has been a material deviation from its requirements. The Court of Justiciary, in such a case, will not be called upon to *review* the judgment of the inferior Judge, but to *quash* the proceedings as *funditus* illegal and null. Thus a conviction was quashed where a warrant was issued for the apprehension of the accused instead of a summons proceeding on sworn information as required by the Act:—*Smith*, H.C., July 22, 1848, Arkley, 508; see also *Smellie* v. *Lockhart*, H. C., June 1, 1844, 2 Broun, 194; *Russel* v. *Lang*, H. C., June 1, 1844, 2 Broun, 211; *Russell* v. *Sprot and Lang*, H. C., Nov. 18, 1844, 2 Broun, 321; *Simpson*, Dec. 22, 1851, 1 Stuart, 239; and *Earl of Kinnoull* v. *Tod*, H. C., Dec. 15, 1859, 3 Irv. 501.

By section 6 of 25 and 26 Vict., cap. 114 (Poaching Prevention Act, 1862), a right of appeal to Quarter Sessions is given, and by section 5 it is provided that "no conviction or order made under "this Act, or adjudication made on appeal there-"from, shall be quashed for want of form, *or be "removed by certiorari or otherwise into any of Her "Majesty's Superior Courts of Record.*" In *Anderson* v. *Nicholson*, Perth, April 22, 2 Couper, 225, it was held that review by the Court of Justiciary was excluded, or rather, that the judgment of the inferior Court was rendered final by these pro-

OBJECTIONS TO JURISDICTION, &c. (2) That review is excluded.

visions. Lord Cowan said,[1] "I am of opinion that "this appeal is incompetent, and that in this Court "we cannot review the decision of the Justices "under an objection that it was contrary to evi-"dence. There can be no doubt that the intention "of the Legislature in passing such a statute as the "'Poaching Prevention Act' was to give a power "of review; but they limited the power, and accord-"ingly provided for an appeal to the Quarter "Sessions only. Some statutes contain express "clauses by which jurisdiction is conferred upon "the Circuit Court of Justiciary, in terms of which "the decisions of Judges in inferior Courts are "brought under review of that Court. But there "is here no such clause; on the contrary, the "statute declares that there is to be no such review, "and therefore it is incompetent to go into the "merits of this case and argue that the evidence "adduced did not warrant a conviction."[2]

To give one more instance, the Statute 9 Geo. IV., cap. 58 (Public Houses Act), secs. 25 and 26, contains similar provisions as to appeal which have been held to exclude review by the Court of Justiciary and Court of Session. But it has been also held that the jurisdiction of those Courts, as the Supreme Courts in criminal and civil cases respectively, is not excluded by those clauses where the proceedings complained of are outwith the statute.[3]

By 25 and 26 Vict., cap. 35 (The Public Houses Acts (Amendment) Act, 1862), secs. 33 and 34, power is given to appeal against the judgment of "the Justice or Justices" to the next Circuit Court of Justiciary, reserving the existing right of appeal to Quarter Sessions. In *Purdie* v. *Mitchell*, Glas-

[1] 2 Couper, 228.

[2] The interlocutor pronounced was:—"Perth, 22d April 1872.—Having "heard counsel for the parties on the objection to the competency of the "appeal in respect of the statutory finality of the judgment complained of, "Sustain the objection and dismiss the appeal to this Court as incompetent: "Find the respondents entitled to expenses: Modify the same to four "guineas, for which decern against the appellant."

[3] *M'Donald*, June 15, 1844, 6 D. 1161; *Philips*, Jan. 12, 1847, 9 D. 318.

OBJECTIONS TO JURISDICTION, &c.
(2) That review is excluded.

gow, Oct. 6, 1863, 4 Irv. 447, it was held that where a party appealed to Quarter Sessions against a conviction by the Justices in Petty Sessions, he could not thereafter bring the judgment of the Justices in Quarter Sessions under review of the Court of Justiciary, although he might have appealed to the Circuit Court in the first instance. But see *Muckersie* v. *M'Dougall*, 3 Couper, 54, *infra*, where the High Court remitted to Quarter Sessions to recal an interlocutor dismissing an appeal against a conviction by the Justices in Petty Sessions. In that case, however, the proceedings in the Court of Quarter Sessions were regarded as fundamentally illegal.

It has also been held under the same statute [1] that suspension in the Bill Chamber is incompetent.—*Aitken* v. *Mollison*, Oct. 13, 1863, reported 2 Macph. 410, note.

Where review is excluded by implication.

Review may be excluded by necessary implication.—As where the statute dispenses with a record of the evidence, or of objections to the admission or rejection of evidence. The superior Court is thus deprived of the means of reviewing the inferior Judge's judgment on the merits, or on such objections; and it may therefore be inferred that it was intended that the inferior Judge's decision on such matters should be final.

The strongest illustration of the exclusion of review, by necessary implication, is to be found in the Summary Procedure Act, 1864. By section 16 it is provided, that it shall not be necessary "*in* "*any proceeding under the authority of this Act*" to record or to preserve a note of the evidence adduced; and under section 16 and the relative Schedule (I), the only matters which need be noted on the record are the respondent's plea, if any, the names of the witnesses examined on oath or affirmation, and a note of the documentary evidence put in.[2] No provision is made for recording objections to the admission or rejection of evidence, or

[1] 25 and 26 Vict., cap. 35.

[2] *Supra*, pp. 91 and 138.

to the relevancy or competency of the charge or proceedings.

OBJECTIONS TO JURISDICTION, &c. (2) That review is excluded.

Special reference is made to sec. 16, note 1, p. 91, *supra*. The following is a summary of the observations there made as to the effect of the provisions of the Summary Procedure Act on complaints raised under and in virtue of penal statutes, and brought under the Summary Procedure Act :—

(1), Where the prosecution is at common law, or under a statute which does not direct or authorise a note of the evidence to be taken, the Judge may refuse to preserve a note of the evidence adduced, and thus exclude review on the merits.—*Gardner* v. *Dymock*, H. C., Jan. 9, 1865, 5 Irv. 13. (2), Where the special statute expressly directs that a note of the evidence shall be preserved, section 16 does not take away the right thereby conferred on the parties; the object of the Summary Procedure Act being to regulate procedure and not to supersede the special Act, it must be read in consistency therewith.—*Wright* v. *Dewar*, H. C., Nov. 27, 1873, and March 9, 1874, 2 Couper, 504. (3), Again, where the special statute provides for an appeal being taken, and directs the Sheriff or Justice to take notes of the evidence adduced, *if required by either party*, such Judge is not entitled to refuse to do so, if either party asks that this should be done. But if neither party requires the Judge to take a note of the evidence, the right of appeal on the merits will be lost, as, indeed, it would be, even if the prosecution were not brought under this Act.—*Halliday* v. *Bathgate* H. C., June 1, 1867, 5 Irv. 382. (4), Where the special statute does not authorise or direct a note of the evidence to be taken, and review is thus excluded, the provisions of section 16 receive effect.—*Anderson and Holms* v. *Cooper*, H. C., March 7, 1868, 1 Couper, 18, and 6 Macph. 560.

3. *That by the statute review is allowed only on certain limited grounds, and that the objections*

OBJECTIONS TO JURISDICTION, &c. (3) That appeal is allowed only on certain grounds, and (4), to another Court.

stated to the judgment or conviction are not among the grounds on which review is so allowed.

Along with this objection it will be convenient to consider the next, which is,—

4. *That another Court of review is fixed by the statute; and that if review be competent the case should be taken by appeal to the Court of review so specified.*

Many of the penal statutes which have been already noticed give a right of appeal to the next Circuit Court, or where there are no Circuit Courts to the High Court of Justiciary, on certain specified grounds, and, *quoad ultra,* declare review to be incompetent. If the objection to the conviction or judgment is not one of those stated in the statute, review by any Court is altogether excluded. If it falls within the grounds stated, the Court of review specified in the statute must be resorted to, at least in the first instance. Thus, in order to entitle an appellant to resort to the Court of review named in the statute, he must make out that his objection falls within the enumerated grounds. On the other hand, in order to enable a party to pass by the Court specified and resort to the High Court of Justiciary, he must show, *first,* that the objection is not within the grounds enumerated; and, *secondly,* that it is not amongst those as to which review is excluded. Or else he must show some urgent reason for not having appealed to the Court named in the statute.

The Small Debt Act contains a good example of such clauses. It not only specifies the grounds on which alone appeal shall be allowed, but in section 30 it gives some at least of the grounds on which review is excluded, these being—(1), Any omission, irregularity, or informality in the citation or proceedings which is not material, or has not been done wilfully; and (2), The merits of the case. The grounds of appeal usually allowed are those con-

tained in section 31 of the Small Debt Act. Illustrations have already been given of cases which have arisen under that section, and special reference is made to p. 247, *et seq.* In addition to what is there said it is only necessary to say a word or two on the ground of appeal in regard to which most difficulty has been felt, viz., "incompetency, includ-"ing *defect* of jurisdiction of the Sheriff."[1] It has been doubted whether these words apply to cases in which the Sheriff or Magistrate entertains and adjudicates upon cases in which he has, in point of fact, *no* jurisdiction. But it is impossible to read the opinions of the majority of the Judges in the Court of Session, and of the Lords in the House of Lords, in the case of *Graham* v. *Mackay*, 7 D. 515, and 6 Bell's Appeals, p. 214, without seeing that it was distinctly decided in that case that "defect "of jurisdiction" means or may mean and include "want of jurisdiction." There the pursuer sought to reduce in the Court of Session a small debt decree, on the ground that the Sheriff who pronounced it had no jurisdiction. The defender objected to the competency of the reduction that it was excluded by section 31 of 1 Vict., cap. 41. The Lord Ordinary repelled this objection, holding that the pursuer's case rested on a total and absolute nullity in the proceedings before the Sheriff. "That "the Sheriff, in truth, was not in the sense of the "statute entitled to the character of Judge at all. "His Court was not *forum competens.* The cause "was not a cause within the authority of the "statute."[2] The Lord Ordinary's judgment was reversed by the Inner House, Lord Mackenzie dissenting. The Lord President said, "The words "of the Act expressly include defect of jurisdiction "as one of the grounds of appeal to the Justiciary. "I read the words defect of jurisdiction as meaning "want of jurisdiction."[3] Lord Fullerton again says,

OBJECTIONS TO JURISDICTION, &c. (3) That appeal is allowed only on certain grounds, and (4), to another Court.

[1] See p. 253, *supra.* [2] 7 D. p. 517. [3] *Ibid.* p. 520.

OBJECTIONS TO JURISDICTION, &c. (3) That appeal is allowed only on certain grounds, and (4), to another Court.

"In one sense it may be said that a decision by the "Sheriff having no jurisdiction, and pronounced in "disregard of the proper rules of procedure, is not "a decision within the authority of the Act. But "that is clearly not the sense in which the term is "used in the statute, otherwise the limitation of "the power of review, even on those very grounds, "would be contradictory and absurd. The mean-"ing clearly is, that where a decision is ostensibly "and *ex facie* of the record a decision under the "authority of the statute, it shall be reviewable, "even in the supposed cases—that is, of alleged "defect of jurisdiction and alleged informality—"only in one specified way."[1] The House of Lords affirmed the judgment of the Inner House on the grounds stated by the Lord President and Lord Fullerton.

This being the legal interpretation of the words "defect of jurisdiction," a party bringing such a case before the High Court by suspension usually endeavours to show that the proceedings complained of have not truly been taken "under the "authority of the statute," and that the matter complained of amounts to fundamental nullity in the proceedings.—See, in particular, the cases of *Walker* v. *Lang*[2] and *Mackenzie* v. *Lang and Cunningham.*[3] In the latter case a suspension was presented to the High Court of a conviction of the crime of theft pronounced under the Glasgow Police Act, 1866,[4] the main ground stated being that the Magistrate had behaved oppressively; that it was incompetent for him to try the charge on which the suspender was convicted, in respect that the property which the suspender was alleged to have stolen belonged to him, the Magistrate; and that thus in trying the case, he acted as Judge in his own cause.

It being objected by the respondent that suspen-

[1] 7 D. 522.
[2] H. C., Nov. 25, 1867, 5 Irv. 506.
[3] H. C., Nov. 9, 1874, 3 Couper, 29.
[4] See appeal clauses quoted *supra*, p. 261.

sion was excluded by sections 131 and 132 of the statute, the suspender contended that the matters complained of constituted an abuse of jurisdiction which amounted to fundamental nullity. But in the course of the argument it became clear that the suspender's objections fell under one or both of two of the grounds of appeal named in the statute, *first*, "defect of jurisdiction," and *second*, "malice "and oppression on the part of the Judge," and that therefore the Circuit Court was the proper Court of review. The Court refused the bill as incompetent. The grounds of judgment are thus succinctly given by Lord Young:—"I put it to the "suspender's counsel within what category he "brought his grounds of complaint. His reply was "that they fell under these two,—first, defect of "jurisdiction, and second, malice and oppression "on the part of the Judge. These are, I think, the "only categories under which the grounds of com-"plaint above stated can come. But when I look "at the Act of Parliament I find that it contem-"plates the possibility of parties being dissatisfied "with the judgments of the Police Court on these "very grounds, and that accordingly it provides a "tribunal before which those so dissatisfied may "obtain redress, and says, in most distinct and "emphatic terms, that it shall be incompetent to "resort to any other. Now, that tribunal is not "the High Court, but the Circuit Court, of Jus-"ticiary. But then it is argued that there is a "distinction between reviewing a judgment and "quashing it as *funditus* null and void. There "may be cases in which such a distinction can be "drawn. But I see no reason for drawing any "such here, except it be that review on the merits "being excluded, every case of review must be, in "order to quash the judgment as *funditus* null. "But in that sense of the term 'review' the power "of review is conferred exclusively upon the Cir-"cuit Court of Justiciary, and the question is, Why

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"did the complainer not go there? He has given "no satisfactory reason."

On the other hand, it would appear from the case of *Muckersie* v. *M'Dougall*,[1] which was a case arising under the Public Houses Acts, 9 Geo. IV., cap. 58, sec. 25, and 25 and 26 Vict., cap. 35, secs. 26, 33 and 34, that a "declinature of jurisdiction" on the part of the inferior Judge does not fall within the grounds of appeal named in the statutes, and that, therefore, the jurisdiction of the High Court is not excluded in such a case. There the suspender was convicted before the Justices in Petty Sessions. She appealed to the next meeting of Quarter Sessions, and at the meeting proposed to adduce witnesses in support of her appeal—no record having been kept of the evidence led before the Court below. The Justices in Quarter Sessions declined to allow the examination of witnesses before them, dismissed the appeal, and sustained the judgment appealed against.

The High Court remitted to the Court of Quarter Sessions to recal the interlocutor complained of and to hear and determine the appeal according to the statute. The Lord Justice-Clerk (Moncreiff) said:—
"It has been decided over and over again that if "an inferior Court possessing jurisdiction under a "statute either oversteps that jurisdiction or re-"fuses to exercise it, however much review may be "excluded or limited under the special statute, we, "sitting in the High Court of Justiciary, have "power to set matters right. I am also of opinion "that the form of suspension is the proper and "recognised form under which such questions "should be raised.[2]

Having said thus much upon the cases which fall within the usual limited grounds of appeal, it will be convenient, before describing the grounds on which it is competent to apply to the High Court,

[1] H. C., Nov. 27 and Dec. 11, 1874, 3 Couper, 54.
[2] With this compare the case of *Dick*, quoted p. 254, *supra*.

notwithstanding the exclusion of review, to mention those cases in which suspensions before the High Court have been refused in respect that, assuming the case to be reviewable, it should have been taken by appeal to the Circuit Court of Justiciary, or other Court of review named in the statute; because, if the proceedings are outwith the statute, a party is entitled to resort to the High Court whatever may be the terms of the statute excluding review, and whether a particular Court of review be specified in it or not. Thus the cases in which the High Court has interfered, notwithstanding clauses excluding review, apply both to heads 3 and 4 of this chapter.

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If a Court of review is specified in the statute to the exclusion of all others, the case must, at least in the first instance, be taken by appeal to that Court. The Circuit Court, if that be the one named, may ultimately certify the case to the High Court; but the course prescribed must be followed, unless the suspender can show that the proceedings complained of are fundamentally null and outwith the statute, or that there is some good reason for his not having availed himself of the remedy provided.

The Statute 9 Geo. IV., cap. 39 (Salmon Fisheries Act), contains an appeal clause to the effect above mentioned.[1] In *M'Phail* v. *Campbell*,[2] M'Phail and others were, on 30th June 1860, convicted by the Sheriff-substitute of offences under the said statute, and sentenced to pay a penalty, and failing payment to imprisonment for a specified period. After the next Circuit Court, which was held in September, the suspender was apprehended in pursuance of this conviction; and on 10th October 1860 he presented a note of suspension to the High Court of Justiciary. The respondent objected to the competency of this suspension, in respect that the suspender should have appealed to the Circuit Court.

[1] Sec. 9.

[2] H. C., March 18, 1861, 4 Irv. 18.

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Before deciding this objection the Court ordered the suspender to lodge a note of his objections to the conviction, and after hearing his counsel upon them unanimously refused the note.

The grounds of judgment sufficiently appear from the following passages in the opinions of Lords Cowan and Ardmillan. Lord Cowan said,[1] "As "regards the proper ground of review I only wish "to say that whatever view I might have taken of "them in judgment, I hold this sentence to have "become final, and that I cannot now consider "them. That it may be open to review for objec- "tions that go fundamentally to the validity of the "sentence I do not mean to deny. If there were "a radical defect, or a clear excess of jurisdiction, "I do not mean to say that there might not be "room for a suspension and liberation. But there "is nothing in the grounds of objection which have "been stated which can properly fall under that "description."

Lord Ardmillan said,[2] "I do not mean to say "that the High Court of Justiciary could not inter- "fere in the case of a clear nullity appearing *ex* "*facie* of the proceedings; or, that if a case of "clear illegality or oppression were shown, the "party would be precluded from appealing. But "I say that all the grounds here stated are of such "a kind that they should have been stated to the "Circuit, and I can see no good reason why they "should not have gone there. I fully concur in "thinking that they are all bad."

The same course was followed in *Walker* v. *Lang*,[3] which was a bill of advocation and suspension of a conviction obtained under the Glasgow Police Act, 1866, on the ground of misconstruction of the statute and want of jurisdiction on the part of the Magistrate. From the appeal clauses of that statute, quoted *supra*,[4] it will be seen that a right

[1] 4 Irv. 26.
[2] *Ibid.*
[3] H. C., Nov. 25, 1867. 5 Irv. 506.
[4] P. 261.

of appeal to the next Circuit Court is given on certain limited grounds, and that review or stay of execution in any other form is declared to be incompetent. The Court, on consideration of these clauses, taken in connection with the objections stated to the conviction, refused the bill as incompetent. Lord Cowan said,[1] "Under the Act a "mode of review is provided, and the sentences of "the Police Magistrate are declared not reviewable "in any other manner, and final. In the section "which provides for review, incompetency and "want of jurisdiction are expressly stated to be "grounds of appeal to the Circuit Court of Justiciary; and by the previous section all other proceedings by way of appeal or review are expressly "excluded. I therefore cannot doubt that the "proper Court for this party to have resorted to "was the Circuit Court of Justiciary. By certification from that Court, had the Judges on Circuit "judged it expedient to have the opinion of the "whole Court of Justiciary on it, the case might "have been brought before us, but not otherwise. "Our jurisdiction, in the first instance, I hold to "be expressly excluded. This construction of the "statute which is before us does not at all interfere "with the power which this Court inherently possesses, and has frequently exercised, to entertain "complaints and appeals against sentences pronounced incompetently or without jurisdiction by "inferior tribunals, when no proper mode of review "is specially provided, and appeals to this Court "excluded, because of the existence of that remedy."

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These remarks apply generally to all such clauses.

See to the same effect, *De-Belmont* v. *Lang*,[2] which was a decision on the same statute. There the suspender endeavoured to elude the limitation by maintaining that the procedure complained of was outwith the statute, and that therefore suspen-

[1] 5 Irv. 516.

[2] H. C., June 28, 1871, 2 Couper, 95.

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sion was competent. But the Court did not take this view of the objections stated, and refused the note as incompetent.

See also *Clark* v. *Bathgate*, H. C., Feb. 8, 1872, 2 Couper, 195, where the question arose under 20 and 21 Vict., cap. 148, and 22 and 23 Vict., cap. 70 (Tweed Fisheries Acts).

In the two following cases it was held that the High Court had no jurisdiction, in respect that by statute the Court of Exchequer[1] alone possessed the power of review.

In *Alexander* v. *Lindsay*, High Court, Nov. 13, 1867, 5 Irv. 491, a bill of suspension and liberation was presented to the High Court of a conviction and warrant of commitment for the period of six months with hard labour,[2] pronounced by the Justices under 16 and 17 Vict., cap. 107 (Customs Consolidation Act, 1853).

The main ground of suspension was want of specification in the complaint. The respondent objected that the High Court had no jurisdiction, and argued, "By sections 290 and 291 of the Customs Consolidation Act, provision is made for "review by means of writs of *certiorari* and *habeas* "*corpus*, writs unknown in this country in any but "the Court of Exchequer; and it is provided by "the 19 and 20 Vict., cap. 56, the Court of Exche-"quer Act, 1856, section 17 and schedule F, that "in all cases where a writ of *certiorari* or *habeas* "might have issued at the date of that Act from "the Court of Exchequer, it shall be competent to "bring up the proceedings to the like effect to the "Court of Exchequer by a note of appeal in the "form of schedule F in lieu of these writs, and this "provision is declared by the schedule to apply to "the customs branch of the revenue. This Court, "therefore, cannot interfere with this provision,

[1] Now the Court of Session as coming in its place, 19 and 20 Vict., cap. 56.

[2] The case was thus in itself criminal *quoad* review in the sense of sec. 28 of the Summary Procedure Act.

"and has no power of review in such cases." The suspender maintained that the complaint was not merely irrelevant but null, in respect of want of specification, and that the High Court had power to give redress in virtue of its inherent power to protect the liberty of the subject against illegal or oppressive procedure in inferior Criminal Courts. The bill was refused as incompetent, Lord Cowan saying,[1] "The Justices had jurisdiction, and the "Exchequer Court alone had power to review the "case on its merits. Any objections to the infor-"mation could alone be competently stated in that "Court; and we have no jurisdiction at common "law to justify our interference in such circum-"stances . . . . Essential radical defects in "the procedure which has led to the incarcera-"tion of any of the lieges, or alleged want of juris-"diction in the Court by which the warrant has "been issued, might have entitled the supreme "tribunal to entertain an application for liberation. "Such power this Court undoubtedly possesses. "But on such grounds as are stated in this suspen-"sion we have at common law no jurisdiction to "set aside this procedure, and none by way of "appeal, either on the relevancy or on the "merits."[2]

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In the recent case, *Lazenby* v. *M'Arthur*, H. C., Nov. 9, 1874, 3 Couper, 23, it was held on the same grounds that suspension of a conviction for dealing in game without a licence, pronounced under the Game Act, 1 and 2 Will. IV., cap. 32, was incompetent in the Court of Justiciary. The argument for the respondent was substantially the same as in *Alexander* v. *Lindsay*. The suspender contended,—"The Act of Will. IV. is not an Excise Act, but "rather of the nature of a Game Trespass Act. "Prosecutions under the Act of William are

[1] 5 Irv. 497.

[2] See the case of *Soky* v. *Wilcox*, H. C., June 2, 1849, reported 5 Irv. 495, note; and *Young* v. *Townshend*, H. C., Nov. 24, 1856, 2 Irv. 525.

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"criminal. The 38th and 39th sections impose "imprisonment for a fixed period on failure to pay "the penalty, and section 28 of the Summary Pro-"cedure Act declares that proceedings in Scotland "by way of complaint, taken under statutes which "so authorise, shall be deemed and taken to be of "a criminal nature."

Cases in which it has been held competent to apply to the High Court notwithstanding clauses excluding review or limiting the grounds of appeal.—The cases above cited show that statutory exclusion or restriction of review is not to be lightly disregarded or overridden. Considerations of expediency or convenience cannot, it is thought, be considered as sufficient to warrant interference by the High Court. If a conviction is pronounced, say three months before the meeting of the next Circuit Court, it may be asked, why should the party convicted not at once obtain redress by coming to the High Court, which is always open? The simple answer is, that the statute has said that he must go to the Circuit Court, and it must be held to have been in contemplation that such an interval might occur between the date of the sentence appealed against and the meeting of the Court; and as to hardship, the hardship is really not so great as that endured by every prisoner who is committed for trial some months before the sitting of the Circuit Court at which he is to be tried. It is not so clear that if the sentence complained of were pronounced within the 15 days which, by statute, must intervene between lodging and service of the appeal and the meeting of the Circuit Court, review by the High Court might not be obtained; because it might be said that it was impossible to appeal to the *next* Circuit Court. Even there, however, it might be answered that the next Circuit Court means the first Circuit Court which shall be held at such an interval after judgment or sentence pronounced, as to admit of the statutory lodging and service of an appeal. It

is the more difficult to justify interference by the High Court where the statute gives to parties aggrieved an appeal to Circuit on *all* competent grounds without restriction, as where the appeal clauses of 20 Geo. II., cap. 43, are incorporated; because, in such cases, the Circuit Court can not only *review* but *quash* the proceedings complained of, and thus one of the reasons usually given for coming to the High Court—viz., that the Court of review specified is only empowered to review, and that on certain limited grounds—is removed.

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Still, there may be cases of glaring oppression or illegality in which a mode of obtaining redress more rapid than an appeal to Circuit is required. In the cases of *Bain* v. *O'Neill*,[1] and *Knight and others* v. *Burnet*,[2] already cited, the power of the High Court to interfere in such emergencies was incidentally recognised. But the *dicta* in those cases were not absolutely essential to the decisions; and the question does not seem to have been fully and deliberately considered until the case of *Gray* v. *M'Gill*, H. C., Feb. 27, 1858, 3 Irv. 29.

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The Act under which the prosecution bore to proceed (6 and 7 Vict., cap. 99, the Glasgow Police Act) contained clauses[3] which gave a right of appeal to the next Circuit Court in the manner provided by 20 Geo. II., cap. 43, without restriction as to the grounds of appeal; appeal in any other manner of way was declared incompetent, and all judgments, &c., were declared final and conclusive, unless appealed from in the manner provided in the statute or in any of the Acts incorporated and adopted by it. Thus the Circuit Court was given exclusive jurisdiction as a Court of appeal, and, in the absence of limiting words, had full power to entertain and decide the very objections raised before the High Court.[4] The delicacy of this question was appreciated by Lord Ivory, who delivered the lead-

[1] 1 Irv. 583.
[2] 2 Irv. 285.
[3] Secs. 281, 282.
[4] *Supra*, pp. 219, 220.

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ing opinion—an opinion which contains, perhaps, the clearest and most carefully guarded exposition of the powers of the High Court in such cases. In dealing with the question of expediency he says,[1] "The objection, if good at all, involves a fundamental question of *jurisdiction.* If the words of "the enactment exclude the interference of the "High Court, no mere considerations of *expediency* "out of the words of the statute will, it is thought, "confer right to interpose at all. If the statute "have conferred *exclusive* jurisdiction on the *Circuit* "*Court,* it is to that Court, and that alone, that redress, however crippled in its application, must at "stated times be applied for. But let us next consider whether there may not be an escape from "this extreme view within the express words of the "statute itself. We have rather come to hold that "there is. The statute distinguishes *two* things. "It says (1), That no judgment or conviction, &c., "'shall be *quashed or vacated* for any misnomer or "'informality.' It says (2), That all 'judgments "'and sentences shall be *final and conclusive,* unless "'*appealed* from in manner hereinafter provided.' "The distinction lies between that which has the "legal character and validity of a sentence or judgment, and which has therefore strength within "itself to subsist so long as it is not altered or "amended on *appeal,* or otherwise by Court of "*review,* and that which is so *funditus* void, that it "has not, and never had, existence as a sentence or "judgment at all, and is, in itself, a mere and absolute nullity, not to be *reviewed* in any proper "sense of that term, but to be *quashed* or *vacated* "as never from the first having had in it any force "or efficacy whatever. So construed, we humbly "think that the sound meaning of the statute goes "only to exclude the jurisdiction of the High Court "in the matter of proper *review,* but to leave that "jurisdiction unimpaired wherever the sentence or

[1] 3 Irv. p. 43.

"judgment is sought to be *quashed* or *vacated* as "*quod ab initio vitiosum.*"

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He then proceeds to apply these principles to the case. It has already been explained that the case was one of gross oppression. The complainer, a child of eight years of age, was dragged into Court, tried, and convicted in absence, and without any communication having been made to his father, and whipped with reckless haste. Apart from objections on the head of oppression, there were certain objections, appearing *ex facie* of the proceedings or admitted by the respondent, which were held sufficient to warrant the interference of the High Court: these were (1), That the conviction bore to proceed partly on evidence adduced and partly on the admission (not the declaration) of the accused; (2), That the conviction was not signed until after the accused had been removed from the bar and was undergoing his sentence; (3), That the complaint did not libel upon the statute, which was the only warrant for the summary proceedings adopted.

In respect of these objections the conviction was held to be fundamentally null. Lord Ivory saying,[1] "I hold that there are good grounds for vacating "and quashing the sentence, without touching on "any ground connected with what are properly the "*merits* of the case."

The interlocutor pronounced was:—

"The Lords Commissioners of Justiciary having considered the bill and answers, and minute, answers and replies, together with the minute subjoined to the replies, and the former debate before the Court, in respect that the grounds of complaint go to the fundamental nullity of the sentence, and appear on the face of the proceedings, Repel the objections to the competency: Pass the bill: Quash and vacate the sentence complained of *simpliciter*, and decern: Find the respondent liable in expenses, and remit," &c.[2]

The essence of this important decision seems to be that such clauses go only to exclude the juris-

[1] 3 Irv. p. 49. [2] 3 Irv. p. 51.

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diction of the High Court in the matter of proper review; and that (however broadly they may be expressed) they leave that jurisdiction unimpaired wherever the proceedings complained of fall to be *quashed* as being fundamentally null.[1]

This decision has an unusually wide application for two reasons—*first*, that the right of appeal to the Circuit Court was not limited to certain grounds, as in the Small Debt Act; and *secondly*, that had the case been taken by appeal to the Circuit Court, that Court could, it is thought, have *quashed* the sentence on the same grounds as those given by the High Court. It would therefore seem to apply *a fortiori* to cases under the Small Debt Act, and under statutes containing appeal clauses framed upon the same model.

It is right to state, however, that it has been maintained by high authorities that under section 31 of the Small Debt Act, the Circuit Court, or the High Court where there are no Circuits, possesses exclusive jurisdiction not merely in matters of review. It has been argued that one of the grounds of appeal is "incompetency including defect of "jurisdiction;"[2] that under that head objections may be stated which go to the nullity of the proceedings; that the Court of Justiciary are given the exclusive power of entertaining such objections; and that therefore the jurisdiction of the supreme Court[3] is excluded not merely *quoad* review, but also as to its right to grant redress where the proceedings have been radically incompetent and outwith the statute.—See the opinion of Lord Deas in *Murchie* v. *Fairbairn*,[4] which was a case under 1 Vict., cap. 41. Lord Deas there held that as "in-"competency" was one of the grounds of appeal the jurisdiction of the Court of Justiciary was ex-

[1] *Per* Lord Ivory, 3 Irv. 44.
[2] *Supra*, pp. 160, 161.
[3] The Court of Session in civil and the High Court of Justiciary in criminal cases.
[4] 1 Macph. 804, *supra*, 259.

clusive not merely in matters of review, but as to objections going to the nullity of the proceedings. Lord Ardmillan agreed with Lord Deas on this point, with this qualification, that, in his opinion, the objection of "incompetency" applied only to "acts in the proceedings *in causa* and before judg-"ment,"[1] and not to proceedings after decree and *post causam*. It is difficult to entirely reconcile these views with the decision in *Gray* v. *M'Gill*, because if full effect were given to them, the Circuit Court would possess a wider jurisdiction under statutes which allow appeal only on certain limited grounds, than where there is no such restriction.

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In practice the rules applied in all such cases are those laid down in *Gray* v. *M'Gill*, viz. that if the proceedings are outwith the statute and radically faulty, the High Court may interfere at once, even although the Court of appeal named in the Act might, on an appeal taken to it, entertain the same objections; but that if the objection resolves itself into a matter of review (on which review is not excluded), the High Court cannot entertain it, and it can be judged of only by the statutory Court of appeal. If it is a matter of review as to which appeal is not allowed, of course the jurisdiction of all Courts of appeal is excluded.

These rules are in accordance with the equity of the matter. Where the proceedings and determination have truly been taken and pronounced under the authority of the statute, and under the safeguards of the procedure therein enjoined, and the matters complained of are merely matters calling for review, there is no great hardship, and there may be a positive benefit, in declaring that review shall be obtained only from a Court brought to the doors of the parties at certain fixed times. But it is otherwise where the proceedings have not the colour of law. There redress cannot be too speedy; and it is not easily to be presumed that

[1] 1 Macph. 805. The vitiation complained of was made after judgment.

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the inherent power of the supreme Court to interfere is excluded even although a cumulative power of entertaining such objections may be given to the Court of appeal named in the statute.

The following are some of the later cases:—In *Manson* v. *Smith*,[1] which was also a case under the Small Debt Act, the jurisdiction of the Court of Session was sustained, although the matter complained of occurred at the commencement of the cause.

The three following cases occurred under the statute 25 and 26 Vict., cap. 35 (The Public Houses Acts (Amendment) Act, 1862), the appeal clauses of which are quoted, *supra*, p. 262. "Incompe-"tency" is not one of the grounds of appeal named.

In *Ross* v. *Stirling*[2] a sentence of Justices of the Peace was suspended by the High Court in respect that expenses had been incompetently awarded to the prosecutor.

Again, in *Clarkson* v. *Muir*,[3] a conviction was quashed by the High Court in respect that whereas the amount of the penalty imposed in the sentence as at first written out was "*two* pounds ten shil-"lings," the word "*three*" was thereafter written over the word "*two*," and thus the sentence was vitiated *in essentialibus*.

In *Muckersie* v. *M'Dougall*[4] the High Court remitted to the Court of Quarter Sessions to recal an interlocutor dismissing an appeal from Petty Sessions, and to hear and determine the appeal according to the statute.

See also *Wright* v. *Dewar*,[5] in which, under reservation of all questions as to the competency of the suspension, a proof was allowed to the suspender of certain specific averments of illegal and

[1] 9 Macph. 492.
[2] H. C., Oct. 22, 1869, 1 Couper, 336, and *supra*, p. 105.
[3] H. C., July 19, 1871, 2 Couper, 125.
[4] 3 Couper, 54, and *supra*, p. 294.
[5] 2 Couper, 505.

oppressive procedure in the conduct of a prosecution under 25 and 26 Vict., cap. 101 (General Police (Scotland) Act, 1762).[1] The suspender failed to prove his averments, and therefore the question of competency was not decided.[2] In allowing a proof Lord Cowan said (p. 513), "On the other branch "of the case I have some difficulty. Much of the "suspender's statement certainly relates to what "falls under the finality clause, and could not be "entertained by the High Court, whatever com-"petency there might have been in the Circuit "Court, had an appeal been taken under this "statute, to entertain such grounds of complaint. "But there are certain allegations to the effect that "fundamental rules of all judicial procedure were "transgressed, which, if proved, may justify and "require the interference of this Court, and I "therefore concur in the course which your Lord-"ship proposes."

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The High Court will entertain a bill of suspension, if otherwise competent, notwithstanding that an appeal to the Court specified in the statute has been taken and intimated.—*De Belmont* v. *Lang*,[3] *Kirkpatrick* v. *Mackay*,[4] and *Muckersie* v. *M'Dougall*.[5]

In the last named case suspension was held competent, and the judgment complained of was ordered to be recalled. In the first two suspension was refused as incompetent on the ground that, looking to the nature of the objections, the Circuit Court had exclusive jurisdiction; but it was not suggested in either case that, if otherwise competent, suspension would have been refused merely because an appeal had been taken, even although the Circuit Court might competently have entertained an appeal on the grounds stated.

[1] Secs. 430, 431, are quoted *supra*, p. 47; the grounds of appeal are those allowed in the Small Debt Act.

[2] For the argument on the question of competency, see 2 Couper, pp. 510, 511, 512.

[3] 2 Couper, 95.

[4] 1 Couper, 436, note 1.

[5] 3 Couper, 54.

It is right that this should be so. An appeal must be taken at once if it is to be taken at all; and the party aggrieved cannot afford to wait until it is seen whether the High Court will entertain his suspension or not. If suspension is refused as incompetent, an appeal previously taken may be prosecuted before the next Circuit Court.[1] But if the suspension is refused on the merits (as distinguished from the question of competency) the judgment is *res judicata,* and an appeal cannot thereafter be insisted in.

[1] *Kirkpatrick* v. *Mackay,* 1 Couper, 434.

CHAPTER VII.

The Grounds of Review.

It is now proposed, in conclusion, to give some illustrations of the various grounds on which it is competent to bring under review proceedings in criminal causes in inferior Courts. Many of these are to be found scattered through previous pages, and a few have been grouped under such general heads as "oppression," "incompetency," "wilful "deviations in point of form,"[1] &c. The main object of the present Chapter is to group a few of these and similar cases under the successive heads or stages of a criminal prosecution or suit in an inferior Court—before trial, during trial, and after trial—to which they respectively belong. It will thus be seen that the power of the supreme Court to interfere and grant redress extends to every step in the process. To a superficial observer it may sometimes appear that proceedings are set aside on somewhat technical and insufficient grounds. It is not really so. It has been well said that "there is no shorthand way of adminis- "tering criminal justice." On the other hand, it is necessary in a large class of cases that the proceedings should be summary, and the difficulty is to insure that they shall be summary, and yet not shorthand. This can only be effected by rigidly enforcing the appropriate rules of criminal procedure as existing at common law or laid down by special statute, as the case may be; and this is the more necessary when review on the facts is excluded. As the Lord Justice-Clerk (Inglis) observed in *Donaldson* v. *Buchan*,[2] "The circumstance that we

[1] *Supra*, p. 247, *et seq.*

[2] 4 Irv. p. 115.

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"cannot review the merits of a judgment on the "evidence makes it all the more necessary that all "the procedure preceding the taking of the evi-"dence by the Judge in the inferior Court should "be perfectly regular."

Where the particulars of a case have been already given, it has been thought sufficient to refer back to the page at which it is dealt with.

1. *Jurisdiction.*

Objections to the jurisdiction of an inferior Judge may be stated in respect either of the character of the crime charged, or of the *locus* of the alleged offence. If the Judge entertains a charge which he is not competent to try,—*e.g.*, one of the pleas of the Crown,—or if he adjudicates upon an offence committed outwith his territory, the proceedings are fundamentally null, and will be set aside. If, again, a Judge refuses to exercise jurisdiction which he possesses, the supreme Court will ordain him to proceed with the case.[1]

Several cases falling under this head have been already examined, in connection with the question of exclusion of review, under the heads of "want," "defect," and "excess" of jurisdiction;[2] and to those passages special reference is made.

In reference to the cases to be mentioned under this and following heads, it need scarcely be observed that the *competency* of an objection is not affected by want of success on its merits.

In *Dawson* v. *M'Lennan*[3] the 1st reason of suspension pleaded was, that the Sheriff had no jurisdiction to try the offence of wicked, felonious, and fraudulent concealment of property by an undischarged bankrupt, in respect that jurisdiction in

[1] *Dick* v. *Great North of Scotland Railway Company*, Aberdeen, Oct. 8, 1860, 3 Irv. 616, *supra*, p. 254.
[2] *Supra*, p. 254.
[3] H. C., April 2, 1863, 4 Irv. 357.

such cases was confined to the Courts of Session and Justiciary. This plea was repelled. JURISDICTION.

In *Lewis* v. *Blair*[1] it was unsuccessfully pleaded by the suspender that the Sheriff had no jurisdiction, on the ground that the offence charged was said to have been committed by a foreign sailor on board a foreign vessel, although within the Sheriff's territory. See also *Edward* v. *The Inverness and Aberdeen Junction Railway Company*, Aberdeen, April 24, 1862, 4 Irv. 185; and *M'Crone* v. *Sawers*, Feb. 10, 1835, 13 S. 443.

2. *Instance.*

At common law a prosecution for a criminal offence may proceed either at the instance of the public prosecutor or of a private party, being the party injured or having the requisite interest, with the concurrence of the public prosecutor.[2]

If the private party has not sufficient interest,—if, *e.g.*, in a prosecution for the crime of theft the articles said to have been stolen do not belong to him, or were not in his lawful possession,—he is not entitled to prosecute, even with the Fiscal's concurrence.—*Mitchell* v. *Scott and Mackay*, H. C., June 24, 1847, Arkley, 315.

Some statutes authorise criminal or quasi-criminal proceedings at the instance of the injured party without the concourse of the Fiscal. For instance, 4 Geo. IV., cap. 34 (Master and Servant Act); *Blackwood* v. *Finnie*, H. C., June 1, 1844, 2 Broun, 206, and *White* v. *Watson, Pellet and Company*, H. C., Nov. 21, 1836, 1 Swin. 344. And 2 and 3 Will. IV., cap. 68 (Day Trespass Act); *Russell* v. *Colquhoun*, H. C., Nov. 24, 1845, 2 Broun, 572.

Under other statutes penalties may be sued for by any one as common informer without the concourse of the Fiscal (*Hamilton* v. *Girvan*, H. C., June 15, 1867, 5 Irv. 439), and without any special

[1] H. C., Feb. 25, 1858, 3 Irv. 16. [2] Hume, ii. 125; Alison, ii. 111.

INSTANCE. interest being averred (*Hanvy* v. *Orr and Stirrat*, Ayr, Sept. 16, 1869, 1 Couper, 334). See also *Kennedy* v. *Cadenhead*, H. C., Nov. 25, 5 Irv. 539.

On the other hand, it was held in *Herbert* v. *The Duke of Roxburgh*,[1] that a private party is not entitled to prosecute under 9 Geo. IV., cap. 69 (the Night Poaching Act), even with the Procurator-Fiscal's concourse, unless he sets forth a sufficient right or interest to do so.

In *M'Kelvie* v. *Barr*, H. C., Dec. 3, 1860, 3 Irv. 631, a sentence, pronounced in a prosecution under 17 and 18 Vict., cap. 104 (Merchant Shipping Act, 1854), was suspended in respect that the instance was defective, being that of a private party without the concurrence of the Procurator-Fiscal. Section 531 of the statute expressly directs that all prosecutions of a criminal nature shall be at the instance of the Procurator-Fiscal, or of the party aggrieved, with his concurrence.

On this subject see *Procurator-Fiscal of Edinburgh* v. *Phillips*, Feb. 24, 1820, F. C.; *Ward* v. *Young*, H. C., May 19, 1847, Arkley, 272; *Anderson and Holms* v. *Cooper*, H. C., March 7, 1868, 1 Couper, 18; and *Angus Mackintosh*, H. C., Nov. 4, 1872, 2 Couper, 367.

As to the effect of the Summary Procedure Act, 1864, on the instance in statutory prosecutions, see section 4 of the Act, note 4, *supra*, p. 73, and section 28, note 5, *supra*, p. 110.

3. *Arrest.*

At common law it is competent to arrest an offender taken in the act without a warrant;[2] and the same course has been held competent when the accused parties were apprehended in the act of committing an offence against a statute (6 Geo. IV.,

[1] H. C., Dec. 26, 1855, 2 Irv. 346. The Court did not find it necessary to decide whether a private party is entitled to prosecute under that Act, even if he has an interest and the concourse of the Fiscal.

[2] Hume, ii. 75, 76; Alison, ii. 116, *et seq.*

cap. 129, Combination Act) which provided that warrant to apprehend should be preceded by the oath of one or more credible persons.—*M'Vie and Linch* v. *Dykes*, H. C., May 28, 1856, 2 Irv. 429, 1st objection. ARREST.

But where some time has elapsed since the commission of the alleged offence, it is not safe to apprehend without a warrant, especially if the accused is law-abiding. In *Jameson* v. *Pilmer*, H. C., June 2, 1849, J. Shaw, 238, a charge was suspended mainly on the ground that the suspender, who was not said to be about to escape, had been arrested without a warrant.

Where a prosecution is raised under a statute which directs that warrants of apprehension or citation shall only be granted on signed petition, or on oath of the party or of a credible witness, the requirements of the statute must be closely followed.

By section 11 of 2 and 3 Will. IV., cap. 68 (Day Trespass Act), it is provided that where any person is charged with a contravention of the Act "on the "oath of a credible witness," the Justice may summon such person; and that if he shall have reason to suspect, "on information on oath," that the party is likely to abscond, he may issue a warrant to apprehend in the first instance.

Convictions have been set aside in several cases on account of a warrant to cite or apprehend granted under the Act not having proceeded on the oath of a credible witness or on sworn information.—*Smith* v. *Forbes and Low*, H. C., July 22, 1848, Arkley, 508; followed by *Simpson* v. *Crauford and Dill*, H. C., Dec. 22, 1851, J. Shaw, 523; and *Blythe and Taylor* v. *Robson*, H. C., June 10, 1853, 1 Irv. 235.

If the statute requires the oath of *the complainer*, the oath of another person cannot be substituted for it.—*M'Neill* v. *Coltness Iron Company*.[1]

Apprehension on indorsed Warrants.—Under 13

[1] H. C., Dec. 10, 1842, 1 Broun, 454.

ARREST. Geo. III., cap. 31, a person apprehended in England on a Scotch warrant indorsed by an English Magistrate must be taken in the first instance to a county in Scotland geographically adjacent to England, and cannot be taken by sea to a county not adjacent[1] to England.—*Mathews* v. *Glasgow Iron Company,* H. C., Nov. 28, 1836, 1 Swin. 393.

As to the apprehension in Scotland of a person charged with having committed a crime in England, see *Watson* v. *Wood and Challinor,* H. C., Nov. 21, 1836, 1 Swin. 339.

In *Beattie* v. *Maxwell's Trustees,* Arkley, 14, the suspender, who had been convicted and sentenced in absence for an offence against 2 and 3 Will. IV., cap. 68, was apprehended at Carlisle on the conviction indorsed by an English Justice of the Peace. On consideration of 13 Geo. III., cap. 31, and 1 Will. IV., cap. 37, sec. 8, it was held that the said conviction was not equivalent to a warrant for apprehension in the sense of the former statute, and that therefore the apprehension was illegal.

See notes to sections 8 and 9 of the Summary Procedure Act, 1864, *supra,* pp. 82-87, in which the existing enactments on this subject are fully discussed.

4. *Citation.*

Many of the observations made and decisions quoted on the subject of *arrest* apply also to *citation.* When the statute under which proceedings are taken provides that a warrant for citation shall be granted, it is incompetent to cite without a warrant. So where, in a summary prosecution for breach of the peace brought under 4 Geo. IV., cap. 29 (Sheriff Court Act), which contemplates a warrant to cite, a party was cited without a warrant, and on his attending at the Court-house was appre-

[1] Provision was not made in the statute for transmission by sea.

hended, placed at the bar, tried and convicted, the Court suspended the conviction.[1] The Lord Justice-Clerk said,[2] "This is not the exercise of common "law summary jurisdiction. It is a proceeding "under a statute, and as a very considerable punish-"ment may be awarded, forms are prescribed both "for the mode of originating the case and of pro-"ceeding afterwards. The statutes contemplate a "warrant to cite, and this imports that the pro-"cedure is to begin with this deliverance, and that "authority is to be given to cite the party. I "apprehend that this procedure must follow in the "order prescribed." CITATION.

The necessity of complying with statutory directions, where forms of procedure are given, is strongly illustrated by *Cockburn* v. *Johnston and Robson*, H. C., June 3, 1854, 1 Irv. 492, where a sentence was suspended *simpliciter*, in respect that a warrant for apprehension was granted without a warrant to cite witnesses, as required by Schedule (C) of 9 Geo. IV., cap. 29, under which the complaint was brought.[3]

An error in the citation as to the day of the diet to which the respondent was cited was held fatal to a conviction in absence, under 2 and 3 Will. IV., cap. 68, in *Waddell* v. *Romanes*, H. C., March 4, 1857, 2 Irv. 611.

Want of or defective citation may be pleaded by the party or his cautioner against sentence of fugitation or forfeiture of bailbond.—*Lacy*, Perth, April 13, 1837, 1 Swin. 493, and p. 29, *supra*.

5. *Search Warrants.*

The leading cases on this head are fully discussed in the notes to Schedule (D) of the Summary Pro-

[1] *Stevenson* v. *Watson*, H. C., Feb. 7, 1857, 2 Irv. 592.
[2] *Ibid.* p. 594.
[3] Quoted, p. 18, *supra*. See also *James Chalmers*, Ayr, Sept. 14, 1836, 1 Swin. 288.

DELAY IN BRINGING ACCUSED BEFORE A MAGISTRATE.

cedure Act, 1864, *supra*, pp. 132-135. See also pp. 186, 187, *supra*.

6. *Delay in bringing the Accused before a Magistrate after Arrest.*

When a party is apprehended without a warrant he must be taken before a Magistrate within as short a time as possible. Suspension and liberation were granted in a case where a delay of sixty hours occurred.—*M'Donald* v. *Lyon and Main*, H. C., Dec. 8, 1851, J. Shaw, 516.

The same rule applies also where a warrant for apprehension is granted, the warrant being issued, not in order to detention, but to bring the accused before the Magistrate for examination, or to answer to the charge.—*Crawford* v. *Blair*, H. C., Nov. 17, 1856, 2 Irv. 511.

7. *Judicial Examination.*

The judicial examination of the accused is a matter prior to and distinct from trial. The accused's declaration should not be confounded with his plea. It may eventually constitute part of the evidence in the case; but it is not a plea, and it must be proved or admitted before it can be made evidence.

A workman charged with a contravention of 4 Geo. IV., cap. 34 (Master and Servant Act), was taken before a Magistrate, and a declaration of considerable length was taken from him. He was not asked to plead, and without further procedure the Magistrate, "having considered the complaint, oath "of the complainer, and declaration of the defender," convicted and pronounced sentence. The Court held that the question "Guilty or not guilty?" should have been put, and that the Magistrate should not have interrogated the accused if he intended to treat his statement as a plea. The decla-

ration was held as being substantially a plea of "not guilty," and suspension and liberation were granted.[1] JUDICIAL EXAMINATION.

This judgment was followed in *Bone* v. *Bird*,[2] which was under the same statute, and in all essential particulars identical. The Lord Justice-Clerk said,[3] "The course ought to be first to ascertain "whether he pleads guilty or not guilty, and then "should he plead not guilty to inquire into the "facts; in which case his declaration may or may "not be competent as matter of evidence." And Lord Ardmillan expressed a doubt which seems well founded,[4]—"I think there is some irregularity "in convicting on such a declaration, even when it "clearly amounts to a plea of guilty."

It would be a sound general rule, it is thought, that a party's declaration should in no circumstances be held as equivalent to a plea. All risk of misconstruction and oppressive interrogation would thus be avoided.

In *Bone* v. *Bird* some observations were made upon an earlier case, *Morrison* v. *Khull*, H. C., Dec. 6, 1841, 2 Swin. 584, in which a bill of suspension was refused, although the Magistrate had convicted on the accused's declaration alone. It appears from the bill of suspension[5] that the conviction was objected to, *inter alia*, on that ground, but nothing is reported as having been said about it, either at the bar or on the bench, when the case was argued and advised, and probably the objection was given up by the suspender. The decision was explained in *Bone* v. *Bird* as having proceeded on the footing that the declaration, which was very short, was unmistakably a plea of guilty; but the case was evidently not regarded as one to be followed as a precedent.

[1] *Logan* v. *M'Adam*, H. C., Dec. 5, 1853, 1 Irv. 329.
[2] H. C., Dec. 3, 1855, 2 Irv. 279.
[3] 2 Irv. 282.
[4] *Ibid.* 284.
[5] 2 Swin. 587.

JUDICIAL EXAMINATION.

A warrant was granted "to apprehend and bring "the defender into Court *for examination* on a "charge of fraud." The defender pleaded guilty, and at once received sentence. This proceeding was held incompetent. Lord Cockburn said, "Here "the party was brought up for examination only. "Examination was all that was to take place there "and then. He appears in order to give his decla-"ration, and this he does by saying that he is guilty "of the offence charged. Instead of recording this "as his declaration, and proceeding to regular trial, "they go on to sentence him at once upon this "confession."[1]

The examination must take place before a Magistrate. A Sheriff-clerk cannot competently act as Sheriff-substitute.—*John Stewart,* Perth, April 22, 1857, 2 Irv. 614.

The Magistrate should be present throughout the whole of the examination.—*Ditrich Mahler and Marcus Berrenhard,* H. C., June 15, 1857, 2 Irv. 634, and *James M'Millan,* Glasgow, Sept. 29, 1858, 3 Irv. 213.

The declaration must be authenticated by the signatures of the accused and of the Magistrate and witnesses.—*Penman* v. *Watt,* 2 Broun, 586; *French and others,* H. C., June 25, 1855, 2 Irv. 198.

8. *Where Delay is improperly refused, or the Accused is taken at a disadvantage and put upon his Trial without sufficient notice or opportunity of preparing for his Defence.*

See pp. 249, 250, *supra.*

In the following cases delay was asked for and improperly refused:—*O'Brien and others* v. *Linton,* H. C., Feb. 21, 1857, 2 Irv. 603; *Orr* v. *M'Callum,* H. C., June 25, 1855, 2 Irv. 183; *Mahon* v. *Morton,* H. C., Feb. 6, 1856, 2 Irv. 383.

Even although delay may not be asked, it may

[1] *Clark* v. *Stevenson,* H. C., Nov. 19, 1853, 1 Irv. 309.

be oppressive in some circumstances to proceed at once to trial; as where the accused is of tender years, or where the charge is of a serious nature requiring time for preparation.—*Crawford* v. *Blair*, H. C., Nov. 17, 1856, 2 Irv. 511; *Graham* v. *Linton*, H. C., Nov. 24, 1856, 2 Irv. 558; *Gray* v. *M'Gill*, 3 Irv. 29; *Jamieson and others* v. *Mackay*, H C., Nov. 24, 1862, 4 Irv. 246, *supra*, p. 250.

DELAY IMPROPERLY REFUSED.

9. *The Complaint or Libel.*

In criminal processes in inferior Courts few matters are more rigidly enforced by the Court of Justiciary than the relevancy and competency of criminal complaints and libels, both as regards the crime or offence charged, and the particular acts which are alleged to constitute it in the individual case. This strictness is essential to the proper administration of justice, because the legality of the conviction depends upon the legality of the charge. The simplest form of conviction is, "Find "the charge proved," or, "Find the prisoner guilty "as libelled." One is thus referred back to the complaint or libel to see what the charge is; and if the charge as therein set forth is irrelevant or incompetent, the conviction must be so too.

It will not do for the prosecutor to say, "The "panel knew perfectly well what was meant; he "was taken in act; he stated no objection to "the complaint; and the evidence clearly estab-"lished his guilt, although not precisely of the "crime or of the criminal acts set forth in the "complaint." It is conceivable that, in the hands of an experienced Judge, what is called "sub-"stantial justice" might be done in such a case; but this would be effected, not by proceeding according to law, but by ignoring the charge and deciding solely on the evidence. He would thus be constituted the Judge not merely of whether a particular charge is proved, but of what the

THE COMPLAINT OR LIBEL.

proper charge is, because, *ex hypothesi*, the charge as libelled is irrelevant, and the crime of which the accused is convicted is not charged in the complaint. This would be a dangerous power to place in the hands of any Judge, and one utterly inconsistent with the well settled rule of criminal procedure that a man cannot be committed or sent to trial on one charge and convicted of another. In the case of Magistrates who are not trained lawyers, such looseness of procedure would be dangerous beyond description, the more so where review on the facts is excluded. It is not disrespectful to that large and useful body of men to say that an unfair burden would be thrown upon them had they to decide the many cases brought before them on such a footing. Given a relevant charge, the limits of the inquiry are well defined; all the Magistrate has to do is to say whether that charge is proved. But once let him throw aside the complaint as not setting forth relevantly and accurately the crime which he is to try, and the proof becomes unmanageable. Its limits are no longer well defined, because the precise matters to be proved are not clearly ascertained *ab ante*. The double burden is thrown on the Magistrate of determining whether the accused has committed a crime or offence, and, if so, what that crime or offence is; and for the first time, on conviction, the accused knows what the precise charge against him is.

This is to invert the proper order of things; it is the course of precognition, not of trial. It is the part of the prosecutor to decide, on the facts ascertained in precognition, what the crime is with which he should charge the accused; it is the part of the Judge thereafter to say *first*, whether the complaint brought by the prosecutor is relevant, and, if so, *secondly*, whether the charge is proved. In the case supposed the Judge would have first to investigate the case, and then decide what crime had been committed and should have been charged.

The form and requisites of criminal complaints

and libels have been so fully discussed already that little remains to be done here but to refer to the passages in question.. THE COMPLAINT OR LIBEL.

(1) *Summary Complaints*:—

Under Sir William Rae's Act.—The form will be found on page 18, note 2. See also pp. 32 and 33.

Under the Summary Procedure Act, 1864.—See pp. 124-130.

The requisites of a summary complaint charging a crime at common law are considered in the notes to Schedule (A), No. 1, of the last named Act, pp. 124-126, *supra.* Complaint at common law.

In addition to the cases there cited, the following may be referred to:—*Wilson* v. *Dykes,*[1] *Rae* v. *Linton.*[2]

In *Donaldson* v. *Buchan*[3] a complaint charging reset of theft was held irrelevant because it contained no substantive averment that the goods had been stolen. The suspension was sustained.

In *Cowan* v. *M'Minn*[4] a complaint charging the crime of theft was held irrelevant, in respect that the *species facti* disclosed a breach of contract, and not a criminal offence. Sentence was suspended *simpliciter.* See also *Neilson* v. *Stirling.*[5]

The requisites of a statutory charge are given in the notes to Schedule (A), No. 2, of the Summary Procedure Act of 1864, *supra,* pp. 127-130. Reference is also made to the cases cited in note 4 to section 5 of the same Act, *supra,* pp. 75-80, which, with two or three exceptions, relate to statutory charges. Statutory charge.

In *Mains and Bannatyne* v. *M'Lullich and Fraser*[6] a charge under section 1 of 9 Geo. IV., cap. 69, was held irrelevant, because the word "unlawfully" was so placed in the complaint as

[1] 2 Couper, 183, *supra,* p. 78.
[2] 2 Rettie (Just.), 17, *supra,* p. 79.
[3] H. C., Nov. 18, 1861, 4 Irv. 109.
[4] H. C., Jan. 8, 1859, 3 Irv. 312.
[5] 1 Couper, 476, *supra,* p. 77.
[6] H. C., Feb. 6, 1860, 3 Irv. 533.

THE COMPLAINT OR LIBEL.

not to apply to the charge of killing a hare therein made.

In *Mitchell* v. *Campbell*[1] a charge under the same statute was held irrelevant because the accused was charged with "taking or destroying game *or* "*rabbits*," the proper statutory charge being "tak-"ing or destroying *game*" alone.

In *Craig* v. *Peebles*, H. C., June 16, 1875, 2 Rettie (Justiciary Cases), 30, a complaint under the Public Houses Amendment (Scotland) Act, 1862, was held irrelevant; it being decided that partial destruction by fire of premises for which the suspender held an unexpired public house certificate, did not put an end to the certificate, so as to subject the holder to a penalty for continuing to sell liquor within the ruined walls of the said premises, which was the offence charged.

Criminal Libels.

(2) *Criminal Libels* in the Sheriff's criminal Court[2] are tested with the same strictness as indictments before the Court of Justiciary. If the libel is irrelevant the sentence will be suspended, although it proceeds on the verdict of an assize.[3]

Not to multiply instances, a sentence, proceeding on the verdict of an assize, was suspended in *Clendinnen* v. *Rodger*,[4] on the ground that the libel was irrelevant. The crime charged in the major proposition was, "Fraud, particularly the "wickedly, fraudulently, and feloniously putting "away, carrying off, or secreting by an insolvent "*or other* debtor of his funds or effects, with "intent to defraud his creditors." It was held that the interjection of the words "*or other*" made the charge irrelevant.[5]

The competency of suspension on the ground of irrelevancy was also recognised in *Jameson* v.

[1] 4 Irv. 257, and *infra*, p. 326.
[2] See pp. 25, 26, and Appendix A, No. 1.
[3] *Supra*, p. 171.
[4] H. C. (full bench), Dec. 2, 1875, 3 Rettie (Justiciary Cases), 3, and Appendix.
[5] Overruling *M'Rae*, Glasgow, Sept. 17, 1867, 5 Irv. 463.

Lothian,[1] *Anderson* v. *Blair*,[2] and *Smith* v. *Lothian*.[3] Little or no weight seems to have been attached in any of these cases to the fact that the objection was not taken by the panel in the inferior Court. In *Clendinnen* v. *Rodger* it was not taken at all. In *Smith* v. *Lothian* it was not taken at the proper time, *i.e.* at the first diet; but there the High Court repelled the objection on its merits, and not because it was not taken timeously.

THE COMPLAINT OR LIBEL.

10. *The rejection of Competent and the admission of Incompetent Evidence.*

Rejection of Competent Evidence.—In the Police Court of Glasgow several parties were charged with acts of disorderly conduct, all arising out of and connected with the same disturbance. Their trials having been separated, some of them tendered as witnesses in their favour others of their number who either had been tried or were to be tried separately. The Magistrate refused to allow the persons so tendered to be examined, on the ground that they were *socii criminis*. The High Court set aside convictions obtained against two of the accused, on the ground that the evidence tendered was improperly rejected.—*Bell and Shaw* v. *Houston*, H. C., Jan. 22, 1842, 1 Broun, 49.[4]

Incompetent Evidence admitted.—In *Kerr* v. *Mackay*, Inverness, April 21, 1853, 1 Irv. 213, a conviction in the Sheriff Court, proceeding on the verdict of an assize, was set aside on the ground that the Sheriff admitted evidence by a Superintendent of Police of information which he had obtained from the accused by means of false representations.

In *Burns* v. *Hart and Young*[5] a conviction,

[1] 2 Irv. 273.
[2] 4 Irv. 5, and *supra*, p. 171.
[3] *Ibid.* 170, and *supra*, p. 24.
[4] See also Hume, ii. 514; Alison, ii. 29.
[5] H. C., Dec. 19, 1856, 2 Irv. 571.

IMPROPER ADMISSION AND REJECTION OF EVIDENCE

which also proceeded on the verdict of an assize, was set aside because, in the course of the trial (the libel charging theft as also reset of theft), evidence was admitted to the effect that the accused was habite and repute a resetter. Lord Cowan said,[1] "The Court is always very unwilling "to set aside a conviction proceeding on the ver-"dict of a jury; but where evidence has been ad-"mitted which is altogether incompetent, we can-"not hesitate to do so."

11. *Failure or Refusal to record, or to take and preserve a Note of Evidence.*

The ordinary common law rule is, that in criminal prosecutions in inferior Courts, the proof must be reduced to writing. This obligation may be dispensed with or relaxed by statute, either expressly or by necessary implication.[2] The Judge's notes may be substituted for a full record of the evidence, as provided by 9 Geo. IV., cap. 29, sec. 20.[3] Or the recording or noting of the evidence may be made dependent upon the parties, or either of them, requiring it to be made.[4] But where there is no statutory dispensation, either expressed or necessarily to be implied, the evidence must be reduced to writing, and not even the express consent of the panel that the evidence shall not be recorded will bar him from bringing the proceedings under review.—*Penman* v. *Watt*, H. C., Nov. 24 and 25, 1845, 2 Broun, 586. The statute under which proceedings were taken in that case was 4 Geo. IV., cap 34.

But if it plainly appears from the statute that the ordinary common law procedure is inapplicable, and that it is not intended that it should be used,

[1] 2 Irv. 574.

[2] See notes to section 16 of the Summary Procedure Act, 1864, *supra*, pp. 91-94.

[3] *Supra*, pp. 18 and 34.

[4] For instance, the Tweed Fisheries Act, 1857, section 93. *Halliday* v. *Bathgate*, 5 Irv. 382.

the evidence need not be reduced to writing. This was held as to proceedings under 6 Geo. IV., cap. 129 (Combination of Workmen Act), in *Knox* v. *Ramsay*, H. C., July 7, 1837, 1 Swin. 517;[1] and as to proceedings under 9 Geo. IV., cap. 69 (the Night Poaching Act), in *Shields* v. *Dykes*, H. C., Feb. 2, 1854, 1 Irv. 359.

FAILURE OR REFUSAL TO RECORD OR NOTE EVIDENCE

12. *Failure or Refusal to note Objections to the Admission or Rejection of Evidence.*

Some statutes and regulations give express directions that such objections shall be noted, for instance—

In jury trials.—The Act of Adjournal, 17th March 1827, chap. V., sec. 1, *supra*, pp. 12 and 31. See also p. 173.

In summary trials—

(1) 9 Geo. IV., cap. 29, sec. 19, *supra*, pp. 18 and 33.

(2) The Summary Prosecutions Appeals Act, 1875, sec. 6, *supra*, p. 209.

Other statutes again prescribe a form of record, which contains no provision for noting such objections,—for instance, section 16, and Schedule (I) of the Summary Procedure Act, 1864, *supra*, pp. 91 and 138,—and thus appear by implication to dispense with such a note. It may be doubted, however, whether, even in proceedings under such a statute, the Court of Justiciary would not order inquiry and grant redress, if it appeared that the Judge had failed when asked to note a well founded and material objection.

13. *Amendment of Complaint or Libel.*

A complaint under the first section of 9 Geo. IV., cap. 69, charged the accused with unlawfully entering or being on certain lands "for the purpose of

[1] Lord Medwyn dissented.

AMENDMENT OF COMPLAINT OR LIBEL.

"taking game *or rabbits.*" The accused having objected to the relevancy of the complaint, on the ground, *inter alia*, that entering or being upon lands for the purpose of taking *rabbits* was not a statutory offence, the Sheriff allowed the prosecutor to delete the words "*or rabbits,*" and, this having been done, repelled the objections to the relevancy. In a suspension it was held that this amendment was incompetent. The Lord Justice-Clerk (Inglis) said, "Such an alteration of the complaint I hold to be "quite incompetent without the consent of the "accused."—*Mitchell* v. *Campbell*, H. C., Jan. 5, 1863, 4 Irv. 257.[1]

Considerable powers of amendment, "not chang-"ing the character of the offence," are given by section 5 of the Summary Procedure Act, 1864. Special reference is made to the notes to that section, *supra*, pp. 73-81, and, in particular, to the case of *Owens* v. *Calderwood*,[2] in which an amendment of a material character was held competent.

14. *Adjournment during Trial and Inclosure of the Assize.*

The power of adjourning, during trial, if not oppressively exercised, is inherent at common law in every Court possessing criminal jurisdiction, on the principle that with jurisdiction there is given every power which is necessary to the full exercise of the jurisdiction.[3] And the same rule applies in proceedings under penal statutes in the absence of provision to the contrary.[4]

As to granting warrant for the incarceration or detention of the respondent during such adjournments, there is more difficulty. In proper criminal causes such a power no doubt exists. But in

[1] See also *Smith* v. *Young*, H. C., March 8, 1856, 2 Irv. 402.
[2] H. C., Feb. 20, 1869, 1 Couper, 217, and *supra*, p. 78.
[3] Opinions of the Lord Justice-Clerk (Inglis) and Lord Cowan in *Bruce* v. *Linton*, Nov. 30, 1860, 23 D. 94 and 95.
[4] *Malonie* v. *Jeffrey*, Jan. 22, 1840, 2 Swin. 485.

quasi-criminal proceedings under penal statutes, the powers of interfering with the liberty of the subject by apprehension or incarceration conferred by the statute are strictly construed. ADJOURNMENT, &c.

In *Bruce* v. *Linton*[1] it was held, in proceedings under the statutes 9 Geo. IV., cap. 58, and 16 and 17 Vict., cap. 67, that where the diet was adjourned by the Magistrate until the following day, it was incompetent for him to grant warrant for the incarceration of the respondent "till he find caution "acted in the books of Court, under a penalty of "£20 sterling for his appearance at that and all "future diets of Court." The Act 16 and 17 Vict., cap. 67, authorises apprehension in the first instance instead of citation, and gives the Magistrates power to adjourn, but it gives no power to incarcerate the respondent during adjournment. The Summary Procedure Act, 1864, section 12, gives express power to the inferior Court, in cases brought under that Act, to grant warrant to detain the respondent in prison "until the period to which the hearing "shall be adjourned, or until he finds sufficient "caution to appear at all future diets of the Court."[2] The power thus given may be exercised in proceedings under statutes which do not authorise detention, provided the complaint is brought under the Summary Procedure Act.

In criminal trials by jury the adjournment of the diet is a matter requiring considerable care and regularity.

The origin of the existing practice as to adjournment during criminal trials by jury, whether in the Court of Justiciary or in the Sheriff Court, where the same rules obtain,[3] was fully discussed in *M'Garth and others* v. *Bathgate*.[4] In the course of a trial by Sheriff and jury, which lasted three days,

[1] 23 D. 85, and *supra*, p. 89.
[2] *Supra*, p. 88.
[3] *Supra*, pp. 17 and 30.
[4] H. C., May 14 and 15, 1869, 1 Couper, 260, erroneously called *M'Garth and Others* v. *Wingate*.

ADJOURNMENT, &c.

the Sheriff twice adjourned the diet without giving in his interlocutors any directions as to the custody of the panels or seclusion of the jury. What the Sheriff omitted to do is thus described by Lord Cowan:[1] "We have no warrant to carry the prisoners to gaol and to bring them up to the adjourned diet; no order on the jurymen to remain under charge of the macers at any appointed place; no duty imposed on any one to keep the jury from communicating with others; and no oath administered to the officers of Court said to have been in charge; nor was any specific duty laid on the Clerk of Court."

In respect of these defects in the interlocutors adjourning the diet, the sentence was suspended, although it was alleged that, in point of fact, the jury had on both occasions remained together in proper custody and seclusion during the adjournments.[2]

If after inclosure any of the jury escape, or are permitted to leave and hold communication with members of the public, the verdict and sentence will in general be set aside,[3] provided the conduct complained of does not come to the knowledge of the panel before the verdict is returned.

In the case of Luke,[4] the panel's counsel, on the

[1] 1 Couper, 279.

[2] The form of interlocutor now used in the High Court in adjourning a criminal trial to another day is as follows:—

"In respect of the length of time already occupied by this trial, and the impossibility of bringing it to a conclusion in the course of this sederunt with a due regard to the case, the Court continued the diet against the panel till to-morrow morning at ten o'clock, and ordained all concerned, panel, parties, witnesses, and assizers, then to attend, each under the pains of law, the panel in the meantime to be carried to and detained in the prison of Edinburgh, and the haill 15 jurors now in the box to repair under the charge of the Macers of Court to Hotel, in Street, Edinburgh, where it was stated accommodation had been provided for them, there to remain till brought here to-morrow in the hour of cause above mentioned, and being strictly secluded during the period of adjournment from all communication with any person whatever on the subject of this trial, the Clerk of Court having access to and liberty to communicate with them in relation to their private affairs."

[Signed by Clerk of Justiciary.]

[3] Alison, ii. 31; *Sanderson*, July 1730, M'Laurin, No. 46; Hume, ii. 515.

[4] Dundee, Sept. 13, 1866, 5 Irv. 293.

ADJOURNMENT, &c.

third day of a trial (the verdict having been returned on the second day) objected, in arrest of judgment, that one of the jury had during an adjournment, between the first and second days of the trial, escaped or been allowed to leave by the macer or officer in charge of the jury, and had been absent all night; and that while so absent he had had communication with certain persons unknown. It was further stated that these facts had only just come to the panel's knowledge. The Court held that the objection came too late;[1] their reasons are thus stated in the interlocutor:—

"In respect the jury empannelled to try the case returned their verdict without any exception being taken to the competency of their so acting, and in respect, further, that on the Advocate-Depute moving for sentence after the verdict had been so returned, the case was then continued (without exception on the part of the panel) for the sole purpose of consideration by the Court of the nature and extent of the punishment to follow the verdict of the jury,—Refuse the motion."

Where a juryman conversed with a person on a subject not connected with the trial, and was absent for about 6 minutes, an objection to the trial was repelled.[2]

15. *The Verdict.*

The verdict must be consistent with the charge. A verdict of guilty of theft, where the charge is assault and robbery, is inept.[3]

Where the charges in the libel are alternative, a general verdict of guilty as libelled is incompetent. The jury must discriminate and say which of the two charges they find proved, otherwise the verdict will be held bad from uncertainty.[4]

Where the charge is theft aggravated by being

[1] The correctness of this ruling seems to be open to doubt, if, as stated, the panel did not know of the irregularity complained of until the day after the verdict was returned.

[2] *Macdonald*, Sept. 26, 1821, Shaw (Just), 43.

[3] *Wallace and Others*, May 21, 1821, Shaw (Just), 30.

[4] *Watt*, Nov. 15, 1824, Shaw (Just), 128; *Sinclair*, Sept. 28, 1825; *Ibid.* 138; *Graham* v. *Toderick*, H. C., May 21, 1864, 4 Irv. 504.

THE VERDICT.

habite and repute a thief, it is incompetent to return a verdict of "guilty of being habite and "repute a thief," but not of theft.[1]

When once recorded the verdict cannot be changed, modified, or explained; if it is inept or contradictory, a valid sentence cannot pass upon it.[2]

16. *Conviction and Sentence.*

Conviction.

(1), *Conviction.*—As already explained, a conviction following on an irrelevant or incompetent charge will be set aside.[3]

Again, a general conviction following on an alternative charge will be suspended.[4]

The conviction must be conform to the charge. Thus where, in a prosecution under 9 Geo. IV., cap. 69, the Sheriff found the accused guilty of being on the lands libelled, "for the purpose of destroying "game as libelled," the conviction was set aside in respect that in his finding the Sheriff had omitted the word "unlawfully,"[5] and that thus the accused was not convicted of the statutory charge.

In *Craig* v. *The Great North of Scotland Railway Company*,[6] the Sheriff convicted the accused "of having failed to deliver up his ticket," but said nothing as to his having refused to pay the fare which was of the essence of the charge founded on the byelaw which was said to have been contravened. Sentence was suspended.

It should be stated in the conviction whether it proceeds on evidence adduced, or on the confession of the accused. When a conviction simply found the accused "guilty of the crime of theft as

[1] *Beatson*, July 17, 1820, Shaw (Just.), 18.

[2] *Hunter and Others* (Glasgow Cotton Spinners' Case), Jan. 8, 1838, 2 Swin. 14 and 15.

[3] *Supra*, p. 171. And see *Arthur* v. *Peebles*, *supra*, p. 128.

[4] *M'Nab* v. *Glass*, H. C., Jan. 22, 1842, 1 Broun, 41; *Jones and M'Ewan* v. *Mitchell*, H. C., Dec. 23, 1853, 1 Irv. 334; *Mains*, 3 Irv. 533, and *supra*, p. 321; *Neilson* v. *Stirling*, 1 Couper, 476, and *supra*, p. 77; *De Banzie* v. *Peebles*, H. C., Mar. 16, 1875, 2 Rettie (Just.), 22.

[5] *Smith* v. *Young*, H. C., Mar. 8, 1856, 2 Irv. 402.

[6] 5 Irv. 206, and *supra*, p. 78.

"charged," without stating the grounds on which it proceeded, it was set aside.[1] CONVICTION AND SENTENCE.

In *Gray* v. *M'Gill*,[2] one ground of suspension was that the conviction bore to proceed partly on evidence adduced, and partly on the admission (not the declaration or plea) of the two accused persons. In regard to this ground of suspension Lord Ardmillan said, "One of the points noticed by your "Lordship I look upon as very important. I mean "that part of the judgment which refers to the "terms of the sentence. A combination of two "kinds of evidence is there set forth—the sentence "bearing to proceed upon a complex view of "evidence and a partial admission. It is clear that "the confession was not of itself sufficient, and "that is the reason why the attempt is made to eke "it out by other evidence. Now I can imagine a "case where a confession may be accompanied by "a distinct qualification, and where the prosecutor "may either take the confession so far as it goes, "and rebut the qualification, or—and this is in "general much the safest plan—he may treat the "plea so qualified as one of not guilty, and let the "case proceed accordingly. But this was not the "course adopted here."

(2), *Sentence.*—The sentence pronounced must be that authorised by the statute or at common law, neither more nor less. Sentence.

A strong illustration of this is to be found in *Ferguson* v. *Thow*,[3] where a sentence, pronounced in a prosecution under 4 Geo. IV., cap. 34, was suspended because hard labour was *not* imposed as part of the sentence. That statute provides that warrant may be granted "for committing him (the "party complained against) to the house of correc-"tion or prison, to remain and be held at hard "labour for a reasonable time, not exceeding three

[1] *Scott* v *Sinclair*, H. C., Dec. 19, 1857, 2 Irv. 745.
[2] 3 Irv. 29, and *supra*. See opinion of Lord Ivory, p. 45, and that of Lord Ardmillan, p. 49.
[3] H. C., June 30, 1862, 4 Irv. 196.

CONVICTION AND SENTENCE.

"months." The Lord Justice-General (M'Neill) said, "It appears to me that the enactment in the "clause referred to is not complete till you come "to the provision regarding hard labour. It is no "good answer that this particular prisoner has no "reason to complain of the non-fulfilment of that "provision. The duty of the Justices is to walk "according to the statute, which imposes one kind "of punishment, and does not leave it open to "them to dispense with the hard labour."

In *Gardner* v. *Dymock*,[1] in a prosecution for a contravention of 13 and 14 Vict., cap. 70, brought under the Summary Procedure Act, a sentence was suspended as disconform to statute, in respect that no pecuniary penalty was imposed.[2] It was held that the Magistrate had not pronounced an exhaustive sentence, and that under the statutes he had no power to abstain from imposing a penalty.

The sentence cannot impose a punishment which is not covered by the prayer of the complaint or libel, even should the sentence be milder than that prayed for. The prayer of a criminal libel was for imprisonment only. On the application of the panel, the Sheriff, after conviction, imposed a fine instead of imprisonment. The sentence was suspended, "in respect the prayer in the original com-"plaint is for imprisonment only, while the sen-"tence pronounced is for a fine."[3]

Where the statute directs that the penalty imposed shall be allocated in a certain way, the sentence will be suspended if this is not done. It was so held in proceedings under 30 and 31 Vict., cap. 141 (Master and Servant Act, 1867).—*Galt* v. *Ritchie*, 2 Couper, 470.

In *Ross* v. *Stirling* it was held that it was incompetent to award expenses in a prosecution for a contravention of section 16 of 25 and 26 Vict., cap. 35 (Public Houses Act, 1862), brought under

[1] 5 Irv. 18. [2] By a majority.
[3] *Lamond* v. *Baker*, Feb. 9, 1860, 22 D. 718.

the Summary Procedure Act. The sentence was accordingly suspended.[1]

In proceedings under the same statutes it was held *ultra vires* of the Magistrates to award immediate imprisonment, in respect that the Public Houses Act, 1862, authorised imprisonment only after failure to pay within fourteen days.[2]

Where imprisonment is awarded in criminal cases, the sentence must specify a definite term of imprisonment. A sentence following on a complaint under 4 Geo. IV., cap. 34, which awarded imprisonment "for a reasonable time not exceeding three months," was suspended, "in respect that no definite period "of imprisonment had been awarded."[3]

Where a case is heard by two Justices or Magistrates, the conviction and sentence must be signed by both.[4] In one case a conviction, signed by the presiding Justice as preses, was sustained in respect of an alleged custom;[5] but whatever may be the law while the Justices are acting in exercise of their common law powers, it is right, when they are acting under statutory authority, that all who hear the case, or at least a quorum, should sign the conviction.[6]

If the sentence is vitiated *in essentialibus*, it will be set aside.[7]

Unless proceedings in absence are authorised by the statute, the conviction and sentence must be written out and signed before the panel is removed from the bar.[8]

[1] H. C., Oct. 22, 1869, 1 Couper, 336, and *supra*, p. 105.

[2] *Rhodes* v. *Ross*, 1 Couper, 469; but see *M'Donell* v. *Davidson*, 1 Couper, 9, and *supra*, p. 222, note 2.

[3] *Grant* v. *Grant*, H. C., Dec. 3, 1855, 2 Irv. 277.

[4] *Lock* v. *Doolen*, H. C., Feb. 6, 1850, J. Shaw, 307; *Williamson* v. *Thomson*, H. C., Nov. 29, 1858, 3 Irv. 295.

[5] *Ranken* v. *Alexander*, 1 Swin. 44.

[6] Compare *Ranken* v. *Alexander*, *supra*, and *Birrel* v. *Jones*, 3 Irv. 556. See *supra*, pp. 214, 215, note 4.

[7] *Murchie* v. *Fairbairn*, 1 Macph. 800, *supra*, 259; and *Clarkson* v. *Muir*, 2 Couper, 125, and *supra*, p. 306; but see *Stewart* v. *Boyd*, where a conviction was sustained, although the Justice by a second interlocutor recalled part of the sentence originally imposed.

[8] *Gray* v. *M'Gill*, 3 Irv. 29, *supra*.

In conclusion it should be stated that the examples given in this chapter are only a few among many illustrations of the grounds of review competent in criminal cases; but it is hoped that they will serve to give a general idea of the powers of the Court of Justiciary in enforcing regularity and purity in the administration of criminal justice in inferior Courts.

APPENDIX.

A.

TRIAL BY JURY ON A CRIMINAL LIBEL.

1. Criminal Libel in Trial by Sheriff and Jury.

ARCHIBALD DAVIDSON, Esquire, Sheriff of Mid-Lothian and Haddington, To

the Clerk of the Sheriff Court of Mid-Lothian, and his deputes, and officers of said Court, executors hereof, respectively, in terms of law, greeting,—WHEREAS it is humbly meant and complained to me by ROBERT LAIDLAW STUART, Procurator-Fiscal of said Court, for the public interest, upon and against A B , now or lately a prisoner in the prison of Edinburgh: THAT ALBEIT, by the laws of this and of every other well-governed realm, THEFT is a crime of a heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that the said A B is guilty of the said crime of theft, actor, or art and part: IN SO FAR AS, the said A B

[Here follows the *species facti.*]

And the said A B having been apprehended and taken before John Tawse, Esq., one of the magistrates of the city of Edinburgh, did, in his presence at Edinburgh, on the

day of 1876,

emit and subscribe a declaration: Which Declaration, as also the articles specified in the Inventory hereunto annexed and referred to, being to be used in evidence against the said A B at his trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the Sheriff Court of Mid-Lothian, before which he is to be tried, that he may have an opportunity of seeing the same: ALL WHICH, or part whereof, being admitted by the judicial confession of the said A B , or found proven by the verdict of an Assize, before me or any of my Substitutes, the said A B ought to be punished with the pains of law, to deter him and others from committing the like crimes in all time coming.

Will of the Libel.[1]

HEREFORE IT IS MY WILL, and I command you, that on sight hereof ye pass, and in Her Majesty's name and authority and mine, lawfully summon, warn, and charge the said A

[1] See p. 23, *supra.* The will contains two diets of compearance in terms of 16 and 17 Vict., cap. 80, sec. 35, and Schedule (L).

CRIMINAL LIBEL. B to compear personally before me, or any of my Substitutes, in a Court to be holden by us, or any of us, at Edinburgh, within the ordinary Sheriff Court-house there, upon the

1st Diet. Twenty-seventh day of November, eighteen hundred and seventy-six years,

in the hour of cause, at twelve o'clock noon, for the first diet, there to plead Guilty or Not Guilty, and to underlye the law for the crime above mentioned; and also, if required, upon the

2d. Diet. Seventh day of December, eighteen hundred and seventy-six years,

for the second diet, at ten o'clock forenoon, again to plead Guilty or Not Guilty, and to underlye the law as aforesaid; as also, if required, for the said second diet alternately, that ye summon an Assize hereto, being not fewer than the number of forty-five persons, together with such witnesses as best know the verity of the premises, whose names are hereto subjoined in a list subscribed by the complainer, personally, or at their dwelling-places, all to compear before me, or any of my Substitutes, time and place of said second diet of compearance; the said persons of inquest to pass upon the Assize of the said A B, and the said witnesses to bear leal and soothfast witnessing, in so far as they know or shall be asked at them, respecting the said A B, his guiltiness of the crime libelled; ilk assizer and witness under the pain of one hundred merks Scots: According to justice, as you shall answer to me thereupon: The which to do I commit to you respectively, in terms of law, as said is, full power by these my letters, delivering them, by you duly executed and endorsed, again to the bearer.

Given at Edinburgh, and signed by the Clerk of the Sheriff Court of Mid-Lothian, the twenty-first day of November, in the year eighteen hundred and seventy-six.

(Signed) JOHN C. WHITTEN,
Sheriff-Clerk.

[*Here follow the inventory referred to in the foregoing libel, the list of witnesses, and the list of the assize.*]

2. Blank Letters of Exculpation.[1]

ARCHIBALD DAVIDSON, Esquire, Sheriff of Mid-Lothian and Haddington,—To
my officers of Court, executors hereof, conjunctly and severally, specially constituted, greeting:—

[1] See pp. 12 and 28, *supra*.

CRIMINAL LIBEL IN TRIAL BY SHERIFF AND JURY.

WHEREAS it is humbly meant and shewn to me by complainer that the said complainer been indicted to stand trial before me in a Criminal Libel at the instance of the Procurator-Fiscal of Court of the said County, for the crime of

and as the said complainer mean to adduce certain witnesses by way of exculpatory proof :—

MY WILL IS HEREFORE, and I charge you strictly, and command, that ye pass, and, in my name and authority, SUMMON, WARN, and CHARGE, personally, or at their dwelling-places, such witnesses as best know the verity of the premises, whose names shall be given to you in a List signed by the complainer or solicitor, to compear before me, or my Substitute, within the Sheriff Court, County Buildings, Edinburgh, upon the day of in the hour of cause (Ten o'clock Forenoon), to bear leal and soothfast witnessing, in so far as they know, or it shall be asked at them, in all matters relating to the said complainer's innocence, or in exculpation of the crime libelled, each under the pain of one hundred merks Scots.—Which to do is hereby committed to you.—According to Justice, as you will answer thereupon.

Given under the hand of the Clerk of Court, at Edinburgh, the day of eighteen hundred and years.

(Signed) , *Sheriff-Clerk.*

3. Record of Trial by Sheriff and Jury.

SHERIFF COURT.

At Edinburgh, the day of 1876 years, in a Sheriff Court of Mid-Lothian, held by Archibald Davidson, Esq., Sheriff of Mid-Lothian and Haddington,—

Compeared A B , the panel, designed in the preceding libel, and accused as therein set forth.

Present,— For the panel,—
The Prosecutor. Mr D. Smith, *Law Agent.*

The Sheriff finds the libel relevant to infer the pains of law.

(Signed) ARCHD. DAVIDSON.

The panel being interrogated by the Court upon the libel, he answers that he is not guilty.

RECORD IN TRIAL BY SHERIFF AND JURY.

The Sheriff, in respect of the said plea of not guilty, continues the case to the day of 1876 years, being the second diet of compearance set forth in the Will of the Libel, and ordains the panel then to appear. (Signed) ARCHD. DAVIDSON.

At Edinburgh, the day of 1876 years, sitting in judgment, Hubert Hamilton, Esq., Sheriff-substitute of Mid-Lothian,—

The diet being again called, recompeared the said A B .

Present,— For the panel,—
The Prosecutor. Mr Brand, *Advocate.*

The panel again pleaded not guilty.

The Sheriff-substitute remits the panel and the libel to the knowledge of an Assize, and allows the panel a proof in exculpation and alleviation.

The following 15 persons were balloted to pass upon the Assize :—[*Here follows list of jurors*],
who were lawfully sworn, and no objections to the contrary.

The following witnesses were adduced, sworn and examined in support of the libel :—[*Witnesses' names*].

The panel admits that the declaration libelled was freely and voluntarily emitted by him of the date it bears, and while in his sound and sober senses.

[*Signed by Counsel or Procurator for Panel.*]

The declaration was here read.

The Procurator-Fiscal declared the evidence in support of the libel closed.

The following witnesses were adduced, sworn and examined in exculpation :—[*Witnesses' names*].

The Counsel for the panel declared the evidence in exculpation closed.

The Prosecutor and the Counsel for the panel severally addressed the Jury.

The Sheriff-substitute summed up the evidence.

The Jury find the panel guilty of the crime of theft as libelled. [*Here follows sentence signed by Sheriff.*]

4. Interlocutor adjourning the Diet from one day to another, in a Trial by Sheriff and Jury.[1]

In respect of the length of time already occupied by the trial, and the impossibility of bringing it to a conclusion in the course of this sederunt with a due regard to the case, the Sheriff [*or* Sheriff-substitute] continues the diet against the panel till to-morrow morning at o'clock, and ordains all concerned then to attend, each under the pains of law, and the

[1] See the case of *M'Garth and others* v. *Bathgate*, 1 Couper, 260, *supra*, p. 327.

panel in the meantime to be carried to and detained in the prison of ; and the haill 15 jurors now in the box to repair under the charge of [*here give name and designation of the officer under whose charge the jury are placed*] to [*give the name of the hotel or house to which the jury are to be taken for the night*], where it is stated that accommodation has been provided for them, there to remain till brought here to-morrow in the hour of cause above mentioned, and being strictly secluded during the period of adjournment from all communication with any person whatever on the subject of this trial, the Clerk of Court having access to and liberty to communicate with them in relation to private affairs. [*Signed by the Sheriff.*]

ADJOURNMENT OF DIET IN TRIAL BY SHERIFF AND JURY

B.

TRIAL ON SUMMARY COMPLAINT.

1. Under 9 Geo. IV., cap. 29 (Sir William Rae's Act), sec. 19, and Schedule (C).

Form of Complaint and Deliverance.—*Supra*, p. 18, note 2.

Procedure thereon and Sentence.—*Supra*, p. 19, note; and pp. 32-34.

2. Under the Summary Procedure Act, 1864.

Forms:—

In Complaints at Common Law.—*Supra*, p. 124.

In Complaints under Statute.—*Supra*, p. 126.

Interlocutors and Warrants.—*Supra*, pp. 130-149.

C.

BILL OF ADVOCATION.

Bill of Advocation[1] *of Judgment dismissing a Complaint.*

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY,

Humbly means and shews your Servitor,—

A B [designing him], *Complainer;*

AGAINST

C D [designing him], *Respondent.*

THAT the complainer is under the necessity of complaining

[1] Or "Advocation and Suspension."

BILL OF ADVOCATION.

your Lordships of a pretended interlocutor or judgment pronounced at on the day of by two of Her Majesty's Justices of the Peace for the county of [*or by the Sheriff-substitute of the County, or other inferior Judge or Judges, naming him or them*], upon a petition or complaint at the instance of the complainer [*if at the instance of a private party add*, with concurrence of E F , Procurator-Fiscal of Court], as therein set forth, charging the respondent with a contravention of the Statute [*or other crime or offence*], whereby the said Justices [*or Sheriff-substitute, or other Judge or Judges*] dismissed the said petition or complaint most wrongously and unjustly, as will appear to your Lordships from the annexed Statement of Facts and Note of Pleas in Law.

Herefore the complainer prays your Lordships for letters of advocation in the premises at his instance in common form; and in the meantime to grant warrant to the [Clerk of the Court in which case has been decided] *at* [the town where the trial took place] *or other custodier of the proceedings at the instance of the complainer against the respondent, and interlocutors following thereon, to transmit the same to the Clerk of Justiciary; and on consideration of the said proceedings, to advocate the same; to recal the interlocutor or judgment complained of; to remit to the Justices of the Peace for the said county* [or other Judge or Judges] *to proceed with the said petition or complaint; to find the complainer entitled to expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper.*

According to Justice.

[Signed by Counsel or Agent].

[*Here follow the Statement of Facts and Note of Pleas in Law,*[1] *which are also signed by the complainer's counsel or agent.*]

First Interlocutor.

Edinburgh, 18 .—Having considered this Bill, Grants warrant for serving a copy thereof, and of this deliverance, on the therein named C D , Respondent; and further, Grants warrant for and ordains transmission of the proceedings

[1] See pp. 167 and 174, *supra*.

complained of to the Clerk of Justiciary, and appoints the case to be heard on the[1] day of . (Signed) C N . BILL OF ADVOCATION.

Execution of Service.

This Bill of Advocation intimated by me, A B [messenger-at-arms *or* Sheriff-officer[2]], to C D , Respondent, by delivering to him personally found a full double of the said bill and of the interlocutor thereon, having a just copy of intimation, service, and requisition subjoined, in presence of M N , residenter in Edinburgh, this day of , eighteen hundred and years.

[Signed by A B .]

M N , *witness.*

Interlocutor sustaining a Bill of Advocation, and remitting to the Justices of the Peace or other inferior Judge or Judges to hear and determine the Complaint.

Edinburgh, 18 .—The Lord Justice-General, *Act.* Lord Justice-Clerk, and Lords Commissioners of Justiciary, having *Alt.* considered this Bill, and heard counsel for the parties:[3] Remit to [*the Justices or other inferior Judge or Judges*] to recal the interlocutor complained of, and to hear and determine the complaint according to the statute: Find the Respondent liable in expenses, which modify to guineas, for which, and one guinea as the dues of extract, decern.

(Signed) J I , *I.P.D.*

Interlocutor refusing a Bill of Advocation.

Edinburgh, 18 .—The Lord Justice-General, *Act.* Lord Justice-Clerk, and Lords Commissioners of Justiciary, having *Alt.* considered this Bill, and heard counsel for the parties, Refuse the Bill:[4] Find the Complainer liable in expenses, which modify to guineas, for which, and one guinea as the dues of extract, decern.

(Signed) J I , *I.P.D.*

[1] The day of hearing is usually left blank. See pp. 168 and 188, *supra.*

[2] By 11 and 12 Vict., cap. 79, sec. 6, it is enacted "That it shall be lawful "to serve all indictments, criminal letters, and other writs, and to execute "all writs and warrants issuing furth of the Court of Justiciary in Scot-"land, either by a macer of Court or a messenger-at-arms, or by any "Sheriff-officer or Steward's officer of the county or stewartry within which "such service or execution shall be made."

[3] Sometimes the words "Pass the bill" are inserted. But these words seem scarcely to be applicable where the case is remitted to the inferior Court. The words "Advocate the cause" are not now used. *Supra,* pp. 169 and 167, note 3.

[4] *Supra,* p. 169.

D.

BILLS OF SUSPENSION AND SUSPENSION AND LIBERATION.

BILL OF SUSPENSION.

1. Bill of Suspension of a Summary Conviction and Sentence imposing a fine and ordaining imprisonment for a specified period failing payment.

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY,

BILL OF SUSPENSION

FOR

A B [designing him], *Complainer;*[1]

AGAINST

C D [designing him], *Respondent.*

Humbly means and shews your Servitor, A B , Complainer,

THAT the complainer is under the necessity of applying to your Lordships for suspension of a pretended warrant or sentence dated on or about the day of , whereby the Sheriff-substitute [*or other inferior Judge or Judges*] at , found the complainer guilty of [*here describe the crime or offence*], and therefore fined and amerciated him in the sum of sterling, payable to the Procurator-Fiscal of Court, and failing payment decerned and ordained the complainer to be removed from the bar and to be imprisoned in the prison of until he should pay said fine, but said period of imprisonment not to exceed days from the date of said sentence, the said sentence being pronounced upon an application at the instance of C D , Procurator-Fiscal of Court, against the complainer, most wrongously and unjustly, as will appear to your Lordships from the annexed Statement of Facts and Note of Pleas in Law.

Therefore the complainer prays your Lordships to grant warrant for serving a copy of this Bill and deliverance thereon on the said C D , the respondent; and further, to grant warrant ordaining the Clerk of the Sheriff (or other) *Court at to transmit the whole proceedings hereinafter mentioned to the Clerk of Justiciary; to suspend the warrant or sentence complained of* simpliciter; *and to*

[1] Or suspender.

find the suspender entitled to expenses; or to do otherwise or further in the premises as to your Lordships may seem proper. BILL OF SUSPENSION.

According to Justice.

[Signed by Counsel or Agent.]

[*Here follow Statement of Facts and Note of Pleas in Law. For Execution of Service and Interlocutors see Appendix C, p. 341,* supra, *and Appendix D, No. 2,* infra, *p. 344.*]

2. Bill of Suspension and Liberation where the Complainer has been summarily convicted, and sentenced to immediate imprisonment.

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY,

BILL OF SUSPENSION AND LIBERATION

FOR

A B [designing him], *Complainer* [or *Suspender*];

AGAINST

C D [designing him], *Respondent.*

Humbly means and shews your Servitor, A B, Complainer,

THAT the complainer is under the necessity of applying to your Lordships for suspension of a pretended conviction and sentence, dated on or about the day of , whereby W G , Esq., Sheriff-substitute at , found the complainer guilty of the crime of theft, as charged in a summary complaint at the respondent's instance, and therefore ordained the complainer to be removed from the bar and to be imprisoned in the prison of for a period of 60 days from the date of the said conviction and sentence, most wrongously and unjustly, as will appear to your Lordships from the annexed Statement of Facts and Note of Pleas in Law.

That the complainer, having been imprisoned in the prison of under the aforesaid conviction and sentence, also prays for liberation. That he is desirous of obtaining *interim* liberation, and submits that in the circumstances he is entitled to *interim* liberation without caution; but if necessary he is willing to find caution in common form to return to prison and undergo the remainder of his sentence in the event of this bill being refused.

Therefore the complainer prays your Lordships to grant warrant for serving this Bill on the said C D , and for the transmission of the whole proceedings com-

BILL OF SUSPENSION AND LIBERATION.

plained of to the Clerk of Justiciary; to suspend the said pretended conviction and sentence simpliciter; *and to ordain the complainer to be immediately set at liberty, if not already liberated* ad interim, *and to find the complainer entitled to expenses; in the meantime to grant* interim *liberation as craved; or to do otherwise or further in the premises as to your Lordships may seem proper.*

[Signed by Counsel or Agent.]

First Interlocutor.

Edinburgh, 18 .—Having considered the foregoing Bill, Grants warrant for serving a copy thereof and of this deliverance on the therein named C D ; and further grants warrant for and ordains transmission of the proceedings complained of to the Clerk of Justiciary; and appoints the case to be heard on the day of : Meantime grants warrant for the liberation of the Complainer on his finding caution in the Court Books of that he shall return to prison, and undergo the remainder of the sentence complained of in the event of this Bill being refused, and that under the penalty of £ sterling.

(Signed) C N .

Execution of Service as in Appendix C, p. 341.

Interlocutor passing the Bill.

Act. Alt. Present—The Complainer personally.[1]

Edinburgh, 18 .—The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered this Bill, and heard counsel for the parties,[2] Pass the Bill: Suspend the conviction and sentence complained of *simpliciter* [*If the complainer is still in prison add,* Ordain the Complainer to be instantly set at liberty, and decern]: Find the Respondent liable in expenses: Modify the same to £ , for which, and one guinea as the dues of extract, decern.

(Signed) J I , *I.P.D.*

Interlocutor refusing the Bill.

Act. Alt. Present—The Complainer personally.[1]

Edinburgh, 18 .—The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered this Bill, and heard counsel for the parties, Refuse the Bill: Find the Complainer liable in expenses: Modify the same to £ , for which, and one guinea as the dues of extract, decern.

(Signed) J I , *I.P.D.*

[1] See 38 and 39 Vict., cap. 62, sec. 10, *supra*, p. 177.

[2] When the Court pass the bill they usually insert findings of their reasons for doing so in the interlocutor. See p. 181, *supra*.

3. Bill of Suspension and Liberation where the Complainer has been convicted on the verdict of an Assize, and sentenced to imprisonment.

BILL OF SUSPENSION AND LIBERATION.

BILL OF SUSPENSION AND LIBERATION,

ANDREW CLENDINNEN

AGAINST

PETER RODGER and GEORGE RODGER.

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY,

BILL OF SUSPENSION AND LIBERATION

FOR

ANDREW CLENDINNEN, presently prisoner in the prison of Selkirk, *Complainer*,

AGAINST

PETER RODGER AND GEORGE RODGER, Writers in Selkirk, Procurators-Fiscal for Selkirkshire, *Respondents*,

Humbly Sheweth,

THAT of this date sentence was pronounced by the Sheriff of Roxburgh, Berwick and Selkirk upon the complainer under a criminal libel at the instance of the said respondents, Procurators-Fiscal of Court for the public interest, against the complainer, whereby the said Sheriff adjudged the complainer to be imprisoned in the prison of Selkirk for the period of three calendar months from this date, and thereafter set at liberty, and granted warrant to all concerned accordingly, most wrongously and unjustly, as will appear to your Lordships from the annexed Statement of Facts and note of Pleas in Law. Nov. 1, 1875. Nov. 1, 1875.

That the complainer feels aggrieved by the said sentence, and is under the necessity of applying to your Lordships for suspension of the same and for liberation.

May it therefore please your Lordships simpliciter *to suspend the said sentence and whole grounds and warrants thereof, and all that has followed thereon; and also to grant warrant charging the Keeper of the Prison of Selkirk to set the complainer at liberty; and at all events to grant warrant for the immediate liberation of the complainer upon his finding caution to such an amount as may be fixed by your Lordships to return to*

BILL OF SUSPENSION AND LIBERATION.

prison in the event of the present bill of suspension and liberation being ultimately refused; and further, to grant warrant ordaining the Sheriff-Clerk at Selkirk or other custodier of the proceedings at the instance of the respondents against the complainer, to transmit the same to the Clerk of Justiciary; and to find the complainer entitled to expenses; or to do otherwise or further in the premises as to your Lordships shall seem proper.

According to Justice, &c.

(Signed) HUGH LOCKHART, *Agent.*

STATEMENT OF FACTS.

1. On the 16th day of October 1875 the respondents, as Procurators-Fiscal of Court for the public interest, executed against the complainer a criminal libel charging him with the crime "of "fraud, particularly the wickedly, fraudulently and feloniously "putting away, carrying off, or secreting by an insolvent or other "debtor of his funds or effects with intent to defraud his creditors."

2. At the first diet, which was held on Friday, the 22d October 1875, the Sheriff-substitute (Milne) found the libel relevant to infer the pains of law, and the complainer thereafter pleaded not guilty. The second diet was held on Monday, the 1st November 1875, when the trial proceeded before the Sheriff (Pattison) and a jury. After trial the jury returned a verdict "finding all in one "voice the said Andrew Clendinnen guilty as libelled, but recom-"mending the said Andrew Clendinnen to the leniency of the "Court."

3. This verdict having been recorded, the Sheriff pronounced the following sentence:—"The Sheriff, in respect of the verdict of the "Assize, sentences and adjudges the said Andrew Clendinnen to be "imprisoned in the prison of Selkirk for the period of three calen-"dar months from this date, and thereafter to be set at liberty, "and grants warrant to all concerned accordingly." In respect of the said sentence the complainer was forthwith imprisoned in the prison of Selkirk, where he still remains.

Nov. 1, 1875.

4. The said conviction and sentence were illegal and unwarrantable, and should be suspended, in respect the complainer was not charged with or convicted of a crime known to the law of Scotland.

5. If it is held that the said major proposition contains a separable alternative charge of the putting away of his funds or effects as aforesaid, by *an insolvent* as distinguished from *any other* debtor, and that such a charge is relevant, the verdict of the jury is bad from uncertainty, as it does not specify the charge or part of the major proposition of which they find the complainer guilty, and therefore the sentence following thereon falls to be suspended.

PLEA in LAW.

BILL OF SUSPENSION AND LIBERATION.

The sentence complained of should be suspended and liberation granted, with expenses, as craved, in respect—

(1), The complainer was not charged with or convicted of any crime known to the law of Scotland.

(2), At least the putting away of his funds or effects by a debtor other than insolvent, with intent to defraud his creditors, is not a crime known to the law of Scotland.

(3), Assuming that the major proposition of the said criminal libel contains a separable charge of the putting away, as aforesaid, of his funds or effects by an insolvent, as distinguished from any other debtor, and *separatim* that such a charge is relevant, the verdict of the jury is bad from uncertainty.

In respect whereof, &c.

(Signed) HUGH LOCKHART, *Agent.*

Edinburgh, 16*th November* 1875.—The Lord Justice-Clerk having considered this Bill, grants warrant for serving a copy thereof, and of this deliverance on the therein named Peter Rodger and George Rodger, Respondents: And further, grants warrant for and ordains transmission of the proceedings complained of to the Clerk of Justiciary; and appoints the case to be heard on Friday first, 19th current, at Two o'clock P.M.

(Signed) MONCREIFF.

Selkirk, 17*th November* 1875.—We accept service of the foregoing Bill of Suspension and Liberation, and deliverance thereon, and dispense with service by an officer.

(Signed) PETER RODGER.
(„) GEO. RODGER.

Edinburgh, 19*th November* 1875.—The Lord Justice-General, Lord Justice Clerk, and Lords Commissioners of Justiciary, having considered this Bill, and heard counsel for the parties thereon, on the motion of the Complainer's counsel, Grant warrant for the interim liberation of the Complainer, on his finding caution in the Sheriff Court Books of Selkirkshire that he will return to prison and undergo the remainder of the imprisonment decerned for, and that under the penalty of Ten pounds sterling, in the event of this Bill being ultimately refused.[1]

(Signed) JOHN INGLIS, *I.P.D.*

[1] As an early day for the hearing was fixed in the first interlocutor, the complainer was not at once liberated *ad interim*. But as the Court were not prepared to pronounce judgment immediately after the hearing, *interim* liberation was granted.

Act. Alt. Present—The Complainer personally.

Edinburgh, 3d December 1875.—The Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of this Bill, and heard counsel for the parties, Find that the major proposition of the Libel is irrelevant: Therefore pass the Bill, suspend the conviction and sentence complained of *simpliciter*, and decern: Find the Respondents liable in expenses: Appoint an account thereof to be lodged, and remit the same to the Clerk of Court to tax and report.

(Signed) JOHN INGLIS, *I.P.D.*

E.

APPEALS TO THE CIRCUIT COURT OF JUSTICIARY.

1. Appeal to the Circuit Court of Justiciary under 20 Geo. II., cap. 43, not *taken and entered in open Court.*

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY, or such of their Lordships as may be the Judges at the next Circuit Court of Justiciary, to be holden at ,

THE

APPEAL

OF

M M [designing him], *Appellant;*

AGAINST

C D [designing him], *Respondent.*

Humbly sheweth,

THAT [*The appeal usually consists of a concise statement of the facts of the case, concluding with an articulate statement of the reasons of appeal; if this form is adopted, add after the Statement of Facts*[1]] That the appellant conceives himself aggrieved by the said conviction and sentence, and now appeals thereagainst in terms of 20 Geo. II., cap. 43, for the following among other reasons to be stated at the hearing of the appeal:—

First [*Here follow the reasons of appeal.*]

May it therefore please your Lordships to recal the conviction and sentence complained of simpliciter, *and also to find the appellant entitled to expenses; or to do otherwise in the premises as to your Lordships may seem just.*

According to Justice, &c.

E F , *Appellant's Agent.*

[1] It is competent to use the form given, *supra*, p. 340; but that here given is usually adopted.

Certificate that the Appeal has been lodged and caution found.[1]

APPEAL UNDER 20 GEO. II., CAP. 43.

[*Place and Date*].—Appeal lodged and caution found in terms of the statute, [or to abide by the judgment of the Circuit Court, and for the expenses, if any, that shall be by that Court awarded in this appeal.] (Signed) A B ,
Depute Sheriff-Clerk.

Acceptance of Service.[2]

I, as agent for C D , the respondent, hold the within appeal as sufficiently intimated, and dispense with more formal intimation, a copy of the appeal having been handed to me.
(Signed) G H ,
Agent for the Respondent.

Execution of Service.

This Appeal served by me A B , messenger-at-arms [*or Sheriff-officer*],[3] upon C D , Respondent, by delivering to him personally a full copy thereof, having a just copy of intimation thereon, in presenoe of E F , [*designing him*], this day of eighteen hundred and years. (Signed A B .
E F , *witness.*

Interlocutor dismissing Appeal.

[*Place and Date*].—Lord D , one of the Lords Commissioners of Justiciary, having heard counsel for the parties, Dismisses the appeal: Affirms the judgment appealed against: Finds the Appellant liable in expenses: Modifies the same to guineas, for which, and , the dues of extract, decerns.
(Signed) G D .

Interlocutor sustaining Appeal.

[*Place and Date*].—Lord D , one of the Lords Commissioners of Justiciary, having heard parties' procurators, Recals the conviction and sentence complained of: Finds the Respondent in the appeal liable in expenses: Modifies the same to guineas, and decerns (or allows an account thereof to be given in, and remits the same when lodged to the Clerk of Court to tax and report).
(Signed) G D .

[1] See pp. 235 and 237, *supra.*
[2] *Supra*, p. 237.
[3] Or other person. See p. 237, *supra.*

APPEAL UNDER 20 GEO. II., CAP. 43.

Interlocutor sustaining Appeal against judgment of Sheriff dismissing Complaint, and remitting to Sheriff to proceed.

Circuit Court of Justiciary.
[*Place and Date*].

Lord *Act. Alt.* . Having heard counsel for the parties, Sustains the appeal and recals the judgment appealed from: Remits the cause back to the Sheriff to proceed therein as shall be just, and decerns.

(Signed) G Y .

Interlocutor certifying an Appeal to the High Court.

Circuit Court of Justiciary.
[*Place and Date*].

Lord *Act. Alt.* . Having heard counsel for the parties, in respect of the general importance of the questions raised in this appeal, and that it is expedient the same should be authoritatively settled by a judgment of the High Court of Justiciary, Certifies this case to the High Court of Justiciary, to meet in Edinburgh, on Monday, the day of next, and appoints the parties to be prepared to discuss the same at that sederunt, or at such other time as may be fixed by the said Court. (Signed) J M .

Interlocutor of High Court disposing of Appeal.

Act. Alt. *Edinburgh,* 18 .—The Lord Justice-Clerk and Lords Commissioners of Justiciary, on the report of the Lord Justice-Clerk, and having heard counsel for the parties, in respect that the complaint on which the conviction appealed against was obtained does not contain any statement relevant to infer a contravention of the Act libelled on, Sustain the appeal, and recal the judgment appealed from: Ordain the penalty and expenses consigned by the Appellant to be repaid to him: Find the Appellant entitled to his expenses in this appeal, of which allow an account to be given in, and remit the same, when lodged, to the Clerk of Court to tax and report.

(Signed) N M , *I.P.D.*

Minute craving Protestation in respect of Appellant not insisting in Appeal.[1]

In the Circuit Court of Justiciary held at upon the day of eighteen hundred and .

PROTESTATION for not enrolling and calling appeal to this Circuit Court of Justiciary, A B , appellant, against a verdict of an Assize finding him guilty of the crime of , and a sentence of the Sheriff-substitute of , at , following thereon, which verdict and sentence were

[1] This minute is sometimes written on the principal appeal, sometimes on the service copy, and sometimes on a separate paper.

obtained at the instance of C D , Procurator-Fiscal of the Sheriff Court there for the public interest, upon the day of , 187 , and which appeal was taken in open Court, and written on the minutes of said Sheriff Court, and bears date the said , 187 .

PROTESTATION FOR NOT INSISTING IN APPEAL

Mr M , Advocate, for the said C D , respondent, protested that the said A B had not enrolled and called said appeal, and craved the dismissal of the appeal with expenses.

In respect whereof, &c.

[*Signed and moved by Counsel.*]

Interlocutor granting Protestation.

[*Place and date*].—Mr A M , for respondent, appeared, and [producing this copy of reasons of appeal[1]], craved protestation against the appellant for not insisting in the appeal.

The appellant failing to appear, Lords and grant protestation against the appellant for not appearing and insisting in the appeal, and find the respondent entitled to guineas of expenses, for which, and the dues of extract, decern at his instance against the appellant.

JAS. C .
CHARLES N .

2. Appeal taken and entered in open Court under 20 Geo. II., cap. 43.

If the appeal is taken by a separate writing, the note or minute lodged, after setting forth the sentence or judgment appealed against, or the substance thereof, should proceed:—[2]

I appeal in open Court against the prefixed judgment (*or* interlocutor *or* sentence) to the next Circuit Court of Justiciary, to be held at [*name of Circuit town*], and that for reasons to be stated at the bar of the said Circuit Court.

(Signed) A B , Appellant (*or*
E F , Procurator for
A B , Appellant).

Docquet by the Clerk of Court on note or minute of appeal.

[*Place and date*].—I hereby certify that the within appeal was taken and entered in open Court, and caution found, all in terms of the statute.

(Signed) C D , *Depute Sheriff-Clerk.*

[1] Insert these words where principal appeal not lodged and minute written on service copy.

[2] If there is time to prepare them, the reasons of appeal may be set forth in the note, but this is not necessary.

APPEAL UNDER 20 GEO. II., CAP. 43.

If no separate writing is lodged, a note of appeal to the following effect should be written on the principal summons or complaint, or other record :—

[*Place and date*].—I appeal against the foregoing judgment[1] (*or* interlocutor, *or* sentence) to the next Circuit Court of Justiciary, to be held at [*name of Circuit town*], and that for reasons to be stated at the bar of the said Circuit Court.

(Signed) A B , Appellant, *or*
E F , Procurator for
A B , Appellant.

Docquet by the Clerk of Court on the Complaint or other Record.

[*Place and date*].—I hereby certify that the foregoing appeal was taken and entered in open Court, and caution found, all in terms of the statute.

(Signed) C D , *Depute Sheriff-Clerk.*

The Appeal or Reasons of Appeal, in the same form as in No. 1, supra, *should be served on the respondent, although it has been doubted whether this is absolutely required.*[2] *The further procedure is the same as in No. 1, pp. 348-351.*

3. Appeal to the Circuit Court of Justiciary under 1 Vict., cap. 41, the Small Debt Act, 1837, against a decree CONDEMNATOR.

The form of the appeal, and the procedure as to taking and entering, service, &c., are the same as in appeals under 20 Geo. II., cap. 43, with this exception, that when by the judgment appealed against the appellant is decerned to make payment of any sum or expenses, he must, as a condition of obtaining a sist of execution and a certificate of appeal, make consignation of the whole sum and expenses, if any, decerned for. In such a case the Clerk of Court's certificate runs:—

[*Place and date*].—Appeal lodged [or taken and entered in open Court].

Received from A B the sum of
being the sum [*or* fine], and expenses decerned for in the summons [*or* complaint] referred to in the foregoing [*or* within] note [*or* minute] of appeal for consignation in terms of the statute 1 Vict., cap. 41, and I certify that sufficient security has been found for the whole expenses which may be incurred and found due under the said appeal. (Signed) C D ,
Dep. Sheriff-Clerk.

[1] Taking care to describe or identify the judgment or judgments appealed against.

[2] See pp. 232 and 236, *supra.*

4. Appeal to the Circuit Court of Justiciary under 1 Vict., cap. 41, the Small Debt Act, 1837, against a decree ABSOLVITOR.

APPEAL UNDER 1 VICT., CAP. 41.

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY, or such of their Lordships' number as shall be present at the next Circuit Court of Justiciary to be holden by them or one or more of their number within the Royal Burgh of Stirling,

THE

APPEAL AND REASONS OF APPEAL

FOR

Miss MARY CALACHAN, Teacher, of Saint Mary's Roman Catholic School, Stirling, for and on behalf of the Managers of the said School, and as duly authorised and empowered by them (such School being in receipt of the Parliamentary Grant), with consent and concurrence of Mrs MARY GIRVAN or MULVANY, residing at No. 78 Baker Street, Stirling, *Pursuer and Appellant;*

AGAINST

JOHN PATERSON, Inspector of Poor for the Parochial Board of the Parish of Stirling, for and on behalf of the said Parochial Board, *Defender and Respondent.*

ON the 11th day of March last the pursuer raised a summons before the Sheriff Small Debt Court of Stirling and Dumbarton, at Stirling, against the respondent, for payment of 9s. 9d., the ordinary school fees for Patrick Mulvany, aged nine years, son of and residing with the said Mrs Mary Girvan or Mulvany. The said Mrs Mary Girvan or Mulvany having been deserted by her husband, and by reason of her poverty being unable to pay said school fees (the said child having been placed at the said school by his parent), and which, in terms of the Act 35 and 36 Victoria, chapter 62, section 69 (The Education (Scotland) Act), it is the duty of the said parochial board to pay, from 16th April 1875 to 4th March 1876, for 32 weeks at 2½d. per week, and 9 weeks at 3d. per week, and for one book for his class, but which fees the said parochial board refuse to pay.

On the case being called in the Small Debt Court held at Stirling on the 31st day of March last, the respondent appeared and stated, amongst other pleas, that the refusal of the said parochial board to pay for the said school fees sued for was final, and not subject to the review of any Court; which plea against the competency the Sheriff-substitute, by his judgment or decree of 14th April last, sustained, and dismissed the action.

The appellant conceives herself aggrieved by the said judgment or decree given by the said Sheriff-substitute, and she now appeals thereagainst to the next Circuit Court of Justiciary to be holden

APPEAL UNDER 1 VICT., CAP. 41.

at Stirling, for the following among other Reasons, to be stated at the hearing of the appeal :—

First, That the said summons or complaint before the Sheriff of Stirling and Dumbarton was competent, and the claim therein sued for was competently sued for.

Second, That the refusal of the said parochial board to pay the said school fees for the said Patrick Mulvany was subject to review, and ought to have been reviewed and enquired into, or the question of the liability of the said parochial board for the school fees sued for ought to have been enquired into and determined by the Sheriff.

Third, That the parent of the said Patrick Mulvany being unable to pay for the said school fees sued for, the respondent is justly due the sum sued for.

The appellant therefore prays that the judgment or decree of the said Sheriff-substitute appealed from may be recalled or altered, and decree granted for the sum sued for in the summons or complaint; or the cause remitted back to the said Sheriff, with instructions to him to give decree for the sum sued for, with expenses; or the cause remitted back to the said Sheriff for hearing on the merits; and that your Lordships decern in the pursuer's favour for the expenses both in the inferior Court and in the Court of appeal.

According to Justice, &c.

(Signed) D. W. LOGIE,
Pursuer and Appellant's Pror.

Docquet by the Sheriff-Clerk.

Stirling, 22d April 1876.—Appeal lodged and caution found, all in terms of the statute.

(Signed) R. M. WALKER, *Dep. Sh.-Clk.*

Acceptance of Service.

Stirling, 22d April 1876.—I, as agent for the Parochial Board for the Parish of Stirling, and the respondent, hold the within appeal as sufficiently intimated, and dispense with more formal intimation, a copy of the appeal having been handed to me.

(Signed) E. GENTLEMAN,
Pror. for Respondent.

Interlocutor of Circuit Court.

Stirling, 2d September 1876.—LORD DEAS.—*Act.* Brand—*Alt.*

Lang.—Lord Deas having heard parties' procurators on the foregoing appeal, Refuses the same: Finds the respondent entitled to expenses: Modifies the same to four guineas, and decerns.

(Signed) GEO. DEAS.

F.

PETITION FOR RECAL OF SENTENCE OF FUGITATION.

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY,

THE

PETITION

OF

A B , sometime Salesman or Warehouseman, residing in , Glasgow, presently residing in ;—

Humbly sheweth,

THAT the petitioner was indicted at the instance of Edward Strathearn Gordon, Esquire, Her Majesty's Advocate, for Her Majesty's interest, to stand his trial before the Circuit Court of Justiciary held at Glasgow in the month of , on an indictment charging him with theft of , the property of Messrs .

That the petitioner, who had been liberated on bail, had, at the date of the service of said indictment, under a sense of shame, left this country for , and did not appear to answer to the said charge; and on the day of sentence of fugitation or outlawry was pronounced against him by the said Circuit Court of Justiciary, and his bail bond, which was for the sum of £20, was declared forfeited. The said sum was soon thereafter paid into Her Majesty's Exchequer.

That soon after his arrival in the petitioner entered the employment of Messrs there, in whose service he continued until he entered that of Messrs , also merchants there, of which firm he is now a partner. He now wishes to return to this country, and by his conduct as a citizen approve himself a faithful and law-abiding subject of Her Majesty.

That in the said circumstances the petitioner is desirous that the sentence of fugitation or outlawry pronounced against him as aforesaid should be recalled.

PETITION FOR RECAL OF SENTENCE OF FUGITATION.

May it therefore please your Lordships to appoint this Petition to be intimated to Her Majesty's Advocate, for Her Majesty's interest; and thereafter to recal the sentence of fugitation or outlawry pronounced against the petitioner as aforesaid, and to repone him thereagainst; or to do otherwise in the premises as to your Lordships may seem proper.

According to Justice, &c.

(Signed) ARTHUR ALISON.

[*Date.*]—I accept intimation, and consent to the prayer being granted. (Signed) WM. WATSON.

Edinburgh, [*Date.*]—The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered this petition, with the consent of Her Majesty's Advocate written thereon, In respect of said consent Recal the sentence of outlawry mentioned in the said petition, and Repone the petitioner thereagainst, as prayed for. (Signed) MONCREIFF, *I.P.D.*

G.

BONDS OF CAUTION.

1. Bond of Caution in an Appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875.

I,

hereby *judicially* ENACT, BIND, and OBLIGE myself, my heirs, executors, and successors, as cautioner and surety, acted in the Police Court Books of the City of Edinburgh, for

That the said

as principal, or I, the said

as cautioner, surety, and full debtor, for and with , shall make payment to

of such expenses as may be found due by the High Court of Justiciary in an appeal to be raised by the said

and that in case it shall be found by the Lords of Justiciary that

the said appellant ought so to do, in the event or issue of the said appeal, all in terms of the Act of Parliament; CONSENTING to the registration hereof in the Books of Council and Session, Police Court Books of the City of Edinburgh, or others competent, therein to remain for preservation, and if necessary, that letters of horning, on six days charge, and all other execution, may pass upon a decreet to be interponed hereto in form as effeirs, and thereto CONSTITUTE

BONDS OF CAUTION.

my procurators.—In WITNESS whereof, these presents, written (in so far as not printed) by [*Testing Clause.*]

A B , *witness.* [*Signature of Cautioner.*]
C D , *witness*

Certificate to be signed by a Justice of the Peace.

I , one of Her Majesty's Justices of the Peace for the county of , hereby certify that I know the cautioner in the within bond, and that he is habite and repute sufficiently responsible for the obligations therein come under by him. (Signed) .

2. Bond where Caution acted in the Books of Adjournal.

I, A B , [*Design*], residing in Edinburgh, bind and oblige myself, my heirs, executors and successors, as cautioner and surety acted in the Books of Adjournal for C D , [*Design*], presently prisoner in the Prison of : That he shall return to prison and undergo the remainder of his sentence in the event of the ultimate refusal of the Bill of Suspension and Liberation presented to the High Court of Justiciary at his instance complaining of a sentence before the Court of at , at the instance of , Procurator-Fiscal of the Court of at , and that under the penalty of pounds sterling, in terms of and conform to an interlocutor of the Honourable Lord , one of the Lords Commissioners of Justiciary, of date the day of current, pronounced in the said Bill: And I consent to the registration hereof in the Books of Adjournal, that letters of horning may pass thereon on a charge of six days, and all other execution needful in form as effeirs, and thereto I constitute

procurators.—In witness whereof, this bond, written by , is subscribed by me at this day of

BONDS OF CAUTION. years, before these witnesses, , and .

, *witness.* A B .
, *witness.*

3. Bond of Caution in Appeal against a Summary Conviction.

SHERIFF COURT OF MID-LOTHIAN.

At Edinburgh, the 8th day of April 1876 years,—

The which day compeared

And hereby judicially enacts, binds and obliges himself, his heirs, executors and successors, as cautioner and surety, acted in the Sheriff Court Books of Mid-Lothian, for John Wilson Liston, Boreas Liston, and John Liston, all fishermen, residing at Newhaven, in the county of Edinburgh, who were charged at the instance of Robert Laidlaw Stuart, Procurator-Fiscal of Court of Mid-Lothian, with a contravention of the 53d section of the Act 31 and 32 Vict., cap. 45, known as "The Sea Fisheries Act, 1868," and on the 5th day of April current, were duly convicted by the Sheriff-substitute of Mid-Lothian, and adjudged to forfeit and pay the sum of Five shillings sterling each, and expenses. That they will answer and abide by the judgment of the superior Court in the appeal, and pay the costs, should any be awarded by that Court, and that under a penalty of Fifty pounds sterling.—IN WITNESS WHEREOF. [*Testing Clause*].

Signature of Cautioner.

A B , *witness.*
C D , *witness.*

Certificate by Justice of the Peace.

I, , one of Her Majesty's Justices of the Peace for the county of Mid-Lothian, do hereby certify that the cautioner , within named and designed, is to my personal knowledge habite and repute responsible for the amount and obligation therein undertaken.

4. Bond of Caution in Appeal, under 1 Vict., cap 41.[1]

I, David William Logie, writer in Stirling, do hereby bind and

[1] In the appeal given on p. 353, *supra.*

oblige myself, and my heirs, executors and successors whomsoever, as cautioner and surety acted in the Sheriff Court Books of Stirling and Dumbarton, at Stirling, for Miss Mary Calachan, teacher, of Saint Mary's Roman Catholic School, Stirling, for and on behalf of the managers of the said school, and as duly authorised and empowered by them (such school being in receipt of the Parliamentary grant), with consent and concurrence of Mrs Mary Girvan or Mulvany, residing at No. 78 Baker Street, Stirling, that she shall answer to and abide by the judgment to be given and pronounced by the Lords Commissioners of Justiciary, or any of them, in their next Circuit Court of Justiciary, to be holden by them, or any one or more of their number, at Stirling, in the month of September next, on hearing the appeal taken by her, the said Miss Mary Calachan, against a judgment or decree, dated the 14th day of April 1876, pronounced by the Sheriff-substitute of Stirling and Dumbarton, in the summons or action depending, or lately depending, before the Sheriff Small Debt Court of Stirling and Dumbarton, at Stirling, at her instance against John Paterson, Inspector of Poor for the Parochial Board of the Parish of Stirling, for and on behalf of the said Parochial Board: And I also bind and oblige myself and my foresaids that the said Miss Mary Calachan shall make payment to the said John Paterson, or to whomsoever the same may be awarded, of whatever sums the said Lords, or any of them, shall modify, award and decern for in name of expenses, in case of wrongous appealing; and I consent to the registration hereof in the Sheriff Court Books of Stirlingshire, or others competent, therein to remain for preservation and execution. —In witness whereof, these presents, written by me, the said David William Logie, are subscribed by me at Stirling, the 22d day of April, in the year 1876, before these witnesses, Robert Milne Walker, Sheriff-Clerk-Depute, Stirling, and William Smith Walker, Clerk in the Sheriff-Clerk's office, Stirling. D. W. LOGIE.

R. M. Walker, *witness.*

Wm. S. Walker, *witness.*

BONDS OF CAUTION.

Certificate by Justice of the Peace.

I, John Murrie, Esquire, one of Her Majesty's Justices of the Peace for the county of Stirling, do hereby certify that the cautioner, David William Logie, within named and designed, is to my personal knowledge habite and repute responsible for the amount and obligation therein undertaken.

Given under my hand at Stirling this 29th day of April 1876.

(Signed) JN. MURRIE.

APPEAL UNDER 1 VICT., CAP. 41.

H.

MEMORANDUM FOR THE PURPOSE OF HAVING A DAY FIXED FOR THE HEARING OF AN ADVOCATION, SUSPENSION, OR APPEAL.

MEMORANDUM

IN

Appeal (Suspension *or* Advocation), A B , Appellant
(*or* Complainer)

AGAINST

C D , Respondent.

That the said A B and C D[1] are desirous that the Court should direct the said case to be enrolled for hearing, for such day as may be convenient.

[Signed by the Parties or their Agents.]

I.

TABLE OF FEES payable to the CLERKS OF JUSTICIARY at 30th May 1856, so far as respects "Private Parties," authorised by the LORDS COMMISSIONERS OF HER MAJESTY'S TREASURY to be received as "heretofore," and ordered to be paid into Exchequer, all other Fees being abolished from and after that date.

		£	s.	d.
1.	Bills of Suspension or Advocation, Summary and other applications, Answers, and other papers, not being Inventories or Notes—(Appeals fall under this head),	0	5	0
2.	Inventories, Productions, or Notes,	0	2	0
3.	Composition for Extract Warrants where service ordered, per sheet,	0	2	6
4.	Diet of Court, each party (except Crown be one),	1	1	0
5.	Bond of Caution,	0	13	6
6.	Certificate of Caution,	0	5	0
7.	Certified copy Interlocutor,	0	3	6
8.	Borrowings, each Receipt,	0	2	0
9.	Returnings, each,	0	1	0
10.	Extract Decreet,	1	1	0

[1] Either of the parties may apply by memorandum. See p. 188, *supra*.

TABLE OF FEES.

11. Fees of auditing Accounts of Expenses, same rate as fixed for Court of Session by Schedule annexed to Act 50 Geo. III., cap. 112, viz. :—			
Account,.....under £10, . . .	£0	7	6
„ £10 „ £20, . . .	0	10	6
„ £20 „ £50, . . .	0	15	0
„ £50 „ £100, . . .	1	1	0
12. Criminal Letters, not exceeding 4 sheets, and 5s. for every additional sheet. .	1	18	0
13. Concurrence of Lord Advocate, . . .	0	12	3
14. Reporting Execution against each Pannel, .	0	10	6
15. Reporting Execution against each Witness for Complainer, ...	0	2	0
16. Diet of Court for Complainer, . . .	1	1	0
Note.—One example only of such a proceeding since January 1833.			
17. Extract Sentences from Books of Adjournal or Record, per sheet, ...	0	7	6
18. Letters of Intimation, each party, . .	0	17	6
19. Do. of Liberation, each party, . .	0	17	6
20. Do. of Horning, 2 sheets, . . .	0	10	6
21. Do. of Caption, and recording Horning, 2 sheets,	0	15	6
22. Do. of Supplement, ...	0	12	6
23. Use of Books of Adjournal, High Court, per volume,	0	5	0
24. „ Minute Books of High Court, per volume,	0	2	6
25. „ „ Circuit, . . .	0	2	6
26. Searches made by the Clerks according to time occupied.			
27. Recording Proceedings in Books of Adjournal, per sheet, ...	0	4	0
28. Ordinary Copyings, per sheet, . . .	0	1	0
29. Copy of each Interlocutor, . . .	0	2	0
30. Certified Copies Indictments in Print, 3 pages, .	0	2	6
31. Every other Page, ...	0	0	6
32. Certified Copies MS. Proceedings, 1st sheet, .	0	2	6
33. Every other sheet, ...	0	1	6
34 Diligences against Witnesses, two sheets, .	0	12	6
35. Every other sheet, ...	0	2	0
36. Lodging Caveats, ...	0	2	0

K.

RECENT CASES.

The following cases were heard since the body of the book was thrown off :—

HIGH COURT, *23d February 1877.*

1. *Greig* v. *Stewart.*—Conviction of three constables under 20 and 21 Vict., cap. 72, sec. 24, set aside, in respect that—(1) the

conviction was general, while the complaint libelled alternative charges; and (2) the conviction was admittedly bad as to one constable, and the penalty was indivisible. See pp. 330 and 332, *supra.*

2. *Campbell* v. *Jamieson.*—Conviction under Education Act, 1872, of gross and unreasonable neglect, in not sending two children of 5 and 9 years of age to school, set aside. The nearest school was 3½ miles distant. Held that the appeal was properly brought under the Appeals Act, 1875, in respect that there was no legal evidence on which to convict as to the child of 5 years old, and that thus a "question of law" was raised. See p. 194, *supra.*

3. *Selkirk Local Authority* v. *Brodie.*—Appeal on a case stated against judgment of Sheriff assoilzieing respondent from petition for recovery of assessment under sections 24 and 105 of Public Health Act, 1867. Objected to competency of appeal that the assessment was not a penalty, or a sum of money in the nature of a penalty, and that thus the petition was not a "cause" in the sense of the Appeals Act, 1875. See pp. 190 and 67, *supra.* The Court took time to consider.

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